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Supreme Court of the United States

OCTOBER TERM, 1963

No. 490

HUDSON DISTRIBUTORS, INC., APPELLANT,

vs.

ELI LILLY & COMPANY.

APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO

FILED SEPTEMBER 24, 1963

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SUPREME COURT OF THE UNITED STATES

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INDEX

RECORD PRESS, PRINTERS, NEW YORK, N. Y., FEBRUARY 5, 1964

[fol. 1]

IN THE COURT OF COMMON PLEAS FOR CUYAHOGA COUNTY, OHIO

No. 730,118

HUDSON DISTRIBUTORS, INC., a corporation, Plaintiff,

vs.

ELI LILLY & COMPANY, a corporation, Defendant.

AMENDED PETITION FOR DECLARATORY JUDGMENT—January 11, 1960

Plaintiff for its cause of action says that it is a corporation duly organized and existing under and by virtue of the laws of the State of Michigan, with its principal place of business at 415 Euclid Avenue, Cleveland, Ohio, and is duly authorized and licensed to do business as a foreign corporation in the State of Ohio.

Plaintiff is the owner and operator of a retail drug store in which plaintiff dispenses prescriptions, and sells vitamins, drugs, patent and proprietary medicines, cosmetics, sundries and other similar items of merchandise generally associated with a retail drug store.

Plaintiff purchases merchandise for resale which merchandise is manufactured by the defendant and by others in interstate commence.

Defendant is a corporation organized and existing under and by virtue of the laws of the State of Indiana and does business in the State of Ohio at 1139 Terminal Tower [fol. 2] Building, Cleveland, Ohio. Defendant manufactures and distributes pharmaceuticals and other commodities in the State of Ohio and throughout the United States.

Defendant has long maintained a policy of establishing minimum prices on commodities of its manufacture pursuant to Fair Trade Laws, wherever such laws exist

and of enforcing such minimum prices to the extent permitted by law.

In conformity with this policy and pursuant to the provisions of the Ohio Fair Trade Act, Revised Code, Sections 1333.27 through 1333.34 inclusive, defendant has established minimum resale prices on commodities manufactured by it and has notified plaintiff of its intention to enforce in the State of Ohio minimum resale prices on such commodities.

Defendant identifies the commodities produced by it by the use of trade marks, trade names and brand names. These commodities bear defendant's trade names, trade marks and brand names and are in free and open competition with commodities of the same general class produced by others and offered for sale in the same general market area.

Plaintiff has acquired the commodities bearing the defendant's trade names, trade marks and brand names after receiving notice of defendant's established minimum resale prices. Following receipt of such notice the plaintiff has sold, offered for sale and advertised for sale these commodities produced by defendant at prices lower than the minimum resale prices provided in such notice.

Plaintiff avers that it has not entered into any contract or agreement with defendant or with any other person, which would forbid plaintiff from advertising, offering for sale or selling commodities manufactured by defendant, or by any other person at less than the minimum resale prices stipulated by defendant or by any other person.

A. Plaintiff avers that certain portions of Sections 1333.27 through 1333.34 of the *Ohio Revised Code*, as [fol. 3] hereinafter specified, are void and beyond the power of the General Assembly of the State of Ohio to enact in that they are in violation of certain provisions of the Ohio Constitution, to wit:

1. Section 1333.28 (I), which provided that a distributor who acquires merchandise upon which minimum resale prices have been established, with notice of such minimum prices, is deemed to have entered into an agreement not to sell below such stipulated minimum prices:

(a) Violates Article I, Section 1, by interfering with the right of the plaintiff to enjoy, acquire, purchase and protect property.

(b) Violates Article I, Section 16, by depriving plaintiff of property without due process of law.

(c) Violates Article I, Section 19, by confiscating plaintiff's private property.

2. Section 1333.29 (A), which provided that a proprietor may establish and control minimum prices by notice to distributors:

(a) Violates Article I, Section 16 by depriving plaintiff of property without due process of law.

(b) Violates Article II, Section 1, by unlawfully delegating legislative power to the defendant herein and to other private persons.

(c) Is an unconstitutional exercise of the police power, in that it bears no relation to the public health, welfare, safety or morals.

3. Section 1333.29 (B), which provides that, after giving notice, the proprietor may require the distributor to sell at not less than the minimum resale prices stipulated by the proprietor and may further require the distributor not to sell to any other distributor without first obtaining an agreement from such other distributor that he will not sell at prices less than the minimum resale prices stipulated by the proprietor:

[fol. 4] (a) Violates Article I, Section 1, by interfering with the right of the plaintiff to enjoy, acquire, purchase and protect property.

(b) Violates Article I, Section 16, by depriving plaintiff of property without due process of law.

(c) Violates Article I, Section 19, by confiscating plaintiff's private property.

4. Section 1333.29 (C), which provides that any contract or notice authorized pursuant to the statute shall be for the benefit of the proprietor and any distributor bound by a similar contract or notice:

(a) Violates Article I, Section 2, by denying plaintiff equal protection of the law and by granting special privileges and immunities to the defendant and to others.

(b) Is an unconstitutional exercise of the police power, in that it bears no relation to the public health, welfare, safety or morals.

(c) Is in conflict with the purpose clause, Section 1333.27 (A) which states that the legislature enacted this legislation to protect and preserve small business.

5. Section 1333.30, which provides that deposit in the mail with postage prepaid of a letter properly addressed to a distributor specifying minimum resale prices established by a proprietor constitutes prima facie evidence of actual notice to said distributor and that the acquisition of merchandise clearly marked or the invoice of which was clearly marked with minimum resale prices established by a proprietor is conclusive evidence of actual notice:

(a) Violates Article I, Section 16 by depriving plaintiff of property without due process of law.

6. Section 1333.31, which provides that the proprietor shall retain a proprietary interest in a commodity so long as such commodity is identified by his trade mark or trade name:

[fol. 5] (a) Violates Article I, Section 1, by interfering with the right of the plaintiff to enjoy, acquire, purchase and protect property.

(b) Violates Article I, Section 16, by depriving plaintiff of property without due process of law.

(c) Violates Article I, Section 19, by confiscating plaintiff's private property.

7. Section 1333.32 (A), which provides that it is unlawful and unfair competition for one with notice, to sell, offer to sell or advertise for sale any commodity upon which the proprietor has established minimum resale prices:

(a) Violates Article I, Section 16, by depriving plaintiff of property without due process of law.

8. Section 1333.32 (B), which provides that any person suffering or reasonably anticipating damage by reason of a violation of this Section may bring suit:

(a) Violates Article I, Section 16, by depriving plaintiff of property without due process of law.

B. Plaintiff further avers that certain portions of Section 1333.27 through 1333.34, *Ohio Revised Code*, as hereinafter specified, are void and beyond the power of the General Assembly of the State of Ohio to enact in that they are contrary to and inconsistent with the Sherman Anti-Trust Act, 26 Stat. 209, as amended, 15 U. S. C., Sections 1 through 8, and do not fall under the exemptions of the Miller-Tydings Act, 50 Stat. 693, 15 U. S. C., Sec. 1, or the McGuire Act, 66 Stat. 632, 15 U. S. C., Section 45, and hence violate Article VI, Clause 2 of the United States Constitution, the Supremacy Clause.

1. Section 1333.29 (B), which provides that after giving notice, the proprietor may require the distributor to sell at not less than the minimum resale price stipulated [fol. 6] by the proprietor and may further require the distributor not to sell to any other distributor without first obtaining an agreement from such other distributor that he will not sell at prices less than the minimum resale prices stipulated by the proprietor, is contrary to and inconsistent with Section 1 of the Sherman Act, as amended by the Miller-Tydings Act, and Section 5(a)(2) and (3) of the McGuire Act in that the Sherman Act, as amended by the Miller-Tydings Act, and the McGuire Act only permit states, territories and the District of Columbia to enact legislation authorizing contracts or agreements prescribing minimum prices.

2. Section 1333.32 (A), which provides that it is unlawful and unfair competition for one with notice, to sell, offer to sell or advertise for sale any commodity upon which the proprietor has established minimum resale prices, is contrary to and inconsistent with Section 5(a) (3) of the McGuire Act in that the McGuire Act requires that the non-signer act wilfully and knowingly.

3. Section 1333.32 (B), which provides that suit may be brought by any person reasonably anticipating damage

is contrary to and inconsistent with Section 5 (a) (3) of the McGuire Act, in that, under the McGuire Act, suit may be brought only by a person actually damaged.

C. Plaintiff further says that Sections 1333.28 (I), 1333.29 (A) and (B), 1333.30, 1333.31 and 1333.32 (A) and (B), of the *Ohio Revised Code* violate the Due Process Clause of the 14th Amendment to the Constitution to the United States of America, in that they deprive plaintiff of property without due process of law.

D. Plaintiff further avers that those sections of the Fair Trade Act which are null and void due to violations of the Federal and Ohio Constitutions are so commingled and intermingled that they are incapable of separation and therefore the entire Fair Trade Act (*Revised Code*, [fol. 7] Sections 1333.27 through 1333.32 inclusive) is unconstitutional.

Plaintiff states that, as set forth hereinabove, it has the right to sell property manufactured by the defendant and by others at below fixed prices whenever plaintiff determines it to be most advantageous and beneficial for its business and for the general public. This right to sell below fixed prices is a valuable property right. The Fair Trade Act (*Revised Code*, Sections 1333.27 through 1333.34 inclusive) arbitrarily imposes restrictions upon plaintiff's valuable property rights and deprives plaintiff of its property without due process of law.

An actual controversy exists between plaintiff and defendant which must be resolved and the rights of the parties finally adjudicated. Plaintiff therefore brings this action in accordance with the provisions of Sections 2721.01 through 2721.15, of the *Ohio Revised Code*, known as "The Uniform Declaratory Judgment Act," asks that this Court construe the Fair Trade Act and determine the plaintiff's rights thereunder, and declare said Act to be invalid, unconstitutional, null and void and of no effect. Plaintiff makes no claim in this proceeding for any monetary relief whatsoever.

Wherefore, plaintiff prays that this Honorable Court construe the Fair Trade Act (*Revised Code*, Sections 1333.27 through 1333.34, inclusive), determine plaintiff's

rights thereunder and declare said Act and the individual sections thereof to be invalid, unconstitutional, null and void, and of no effect whatsoever in its and their application to plaintiff herein.

Mendelsohn, Krotinger & Lane, By Myron H. Krotinger, Attorneys for Plaintiff.

Of Counsel: Mendelsohn, Krotinger & Lane, Hertzberg & Weingarten.

[fol. 8]

IN THE COURT OF COMMON PLEAS

ANSWER AND CROSS-PETITION—February 29, 1960

Answer.

Now comes the defendant, Eli Lilly and Company, and for its Answer to plaintiff's Amended Petition—

1. Admits the allegations contained in unnumbered paragraphs one, two, three, four and five of page 1, and in unnumbered paragraphs one, two and three of page 2, of the Amended Petition.

2. Denies each and every other allegation of the Amended Petition, and specifically the allegations contained in all paragraphs beginning with and following unnumbered paragraph four of page 2 of the Amended Petition.

Cross-Petition.

By way of Cross-Petition the defendant, Eli Lilly and Company, adopts by reference all of the allegations contained in the Amended Petition which are admitted in paragraph 1 of the above Answer, and says further—

3. The pharmaceuticals and other commodities produced and sold by defendant, and so identified by its trademarks, trade names and brand names, are sold, offered for sale and advertised for sale in retail pharmaceutical outlets in the State of Ohio and throughout the United States.

4. Such commodities have been widely and extensively promoted and advertised in the State of Ohio and throughout the United States, and defendant has expended large sums of money in such promotion and advertising; through such promotion and advertising defendant's trademarks, trade names and brand names have become well and favorably known to the pharmaceutical trade, the medical profession and the public in general, in the State of Ohio and throughout the United States, as identifying commodities [fol. 9] manufactured and produced by defendant, and defendant has thereby acquired and possesses a valuable reputation and goodwill attached to such trademarks, trade names and brand names.

5. Under date of October 1, 1959, defendant notified plaintiff and all known Ohio retail pharmaceutical outlets selling defendant's commodities in writing of its intention and policy to establish minimum retail resale prices for its commodities pursuant to the Ohio Fair Trade Act, Ohio Revised Code, Sections 1333.27 through 1333.34, and invited them to enter into fair trade contracts with defendant. A true copy of such notification is attached hereto as "Exhibit A" and made a part hereof.

6. Defendant has entered into such fair trade contracts which are still in full force and effect with numerous retail pharmaceutical outlets in Ohio, by the terms of which defendant established minimum retail resale prices for its commodities and the retailer agreed not to sell, offer to sell or advertise for sale at retail defendant's commodities at prices less than the minimum retail resale prices so established; a true copy of such a contract is attached hereto as "Exhibit B" and made a part hereof.

7. Under date of December 10, 1959, defendant wrote plaintiff by certified mail that it had been informed plaintiff was selling defendant's commodities, so identified, at prices below the minimum retail resale prices established by defendant for such commodities, again advised plaintiff of the establishment by defendant of minimum retail resale prices for its commodities and specified such prices to plaintiff, and again advised plaintiff that defendant had

entered into fair trade contracts with numerous Ohio retail pharmaceutical outlets and invited plaintiff to enter into such a contract with defendant. A true copy of such notification is attached hereto as "Exhibit C" and made a part hereof.

[fol. 10] 8. Under date of January 26, 1960, defendant again wrote plaintiff by certified mail advising plaintiff of the establishment by defendant of minimum retail resale prices for its commodities and specifying such prices, and advising plaintiff that defendant had entered into fair trade contracts with numerous Ohio retail pharmaceutical outlets. A true copy of such notification is attached hereto as "Exhibit D" and made a part hereof.

9. Plaintiff has wilfully and knowingly sold, offered for sale and advertised for sale at prices less than defendant's established minimum retail resale prices commodities of defendant, so identified, which were acquired by plaintiff after notice to it of the establishment by defendant of minimum retail resale prices for such commodities and of such prices, and after notice to it of the entering into by defendant of fair trade contracts with Ohio retail pharmaceutical outlets.

10. Such sales by plaintiff were not: (a) in closing out plaintiff's stock of such commodities for the purpose of discontinuing dealing therein; (b) of such commodities which were altered, secondhand, damaged, defaced or deteriorated; (c) by an officer acting under court order; or (d) of such commodities after removal of all trace of defendant's trademarks, trade names or brand names.

11. Plaintiff's wilful and knowing sale, offering for sale and advertising for sale of such commodities of defendant, so identified, and so acquired by plaintiff, at prices less than such established minimum retail resale prices have deprived defendant of the benefit of the Ohio Fair Trade Act, and have caused and threaten to cause irreparable damage to defendant's business and goodwill and to the value of defendant's trademarks, trade names and brand names.

12. Defendant is unable to state the exact amount of damage it has thus suffered until an accounting shall be made of such transactions by plaintiff.

[fol. 11] 13. Unless restrained and enjoined by an order of this Court, plaintiff will continue to wilfully and knowingly sell, offer for sale and advertise for sale such commodities of defendant, so identified, and so acquired by plaintiff, at prices below such minimum retail resale prices established by defendant.

14. Defendant has no adequate remedy at law with respect to the matters herein alleged.

Wherefore, defendant respectfully prays—

A. That pending final decision of this cause the Court grant it a temporary order enjoining plaintiff, and its officers, employees, agents, and successors and assigns, from selling, offering for sale or advertising for sale at retail such commodities produced by defendant, so identified, and so acquired by plaintiff, at prices below the minimum retail resale prices now established by ~~defendant or hereafter~~ established by defendant pursuant to the provisions of the Ohio Fair Trade Act, and pursuant to the fair trade contracts executed by defendant and in effect in the State of Ohio.

B. That upon final hearing of this cause, such order be made permanent.

C. That the Court grant it an order authorizing defendant to make or cause to be made by certified public accountants an audit of plaintiff's books to and including the date of such temporary order with regard to all transactions involving such commodities produced by defendant, so identified, and so acquired by plaintiff, and that plaintiff be required to account to defendant for all profits derived by it, and for all damages suffered by defendant, by reason of the unlawful acts of plaintiff claimed herein.

D. That it be awarded recovery against plaintiff of all damages and costs suffered by defendant on account of said unlawful acts of plaintiff, including the costs of this suit and reasonable attorney fees.

[fol. 12]. E. That it be afforded such further orders and relief in the premises as may be just and proper.

Henderson, Quail, Schneider & Peirce, By Louis S. Peirce, Attorneys for Defendant.

[fol. 13]

Exhibit A to Answer and Cross Petition.

(Filed in Common Pleas Court February 29, 1960.)

Notification from Defendant to Its Retail Distributors, Dated October 1, 1959.

Eli Lilly and Company

Indianapolis 6, U. S. A.—Melrose 6-2211

October 1, 1959

To the Pharmacists of Ohio

Eli Lilly and Company wishes to congratulate the pharmacists of Ohio for their successful efforts in obtaining passage of the new Ohio Fair Trade Act.

This company will continue to vigorously support fair trade and wishes to give you notice of this policy. We have enclosed duplicate copies of our standard form Manufacturer-Retailer Fair Trade Contract, which we invite you to sign. This contract supersedes those executed under the prior Ohio Fair Trade Law.

[fol. 14] You may indicate your desire to enter into the contract by signing both copies of this contract and returning them in the enclosed envelope. We will then approve the contract in Indianapolis and send you a fully executed copy of the contract for your files.

Very truly yours,

Eli Lilly and Company
A. J. W. LeBien,
Vice President, Marketing.

jj
enclosures

[fol. 15]

Exhibit B to Answer and Cross-Petition

Eli Lilly and Company Manufacturer-Retailer Contract

This Agreement executed in duplicate by and between Eli Lilly and Company, an Indiana corporation of Indianapolis, Indiana, (hereinafter called Manufacturer) and A and A Drug Co. doing business at 5408 Superior Ave., Cleveland, Ohio, (hereinafter called Retailer); Witnesseth:

Whereas Manufacturer is engaged in the manufacture and sale of a complete line of pharmaceutical and biological commodities which are identified by its trademarks, brands, and name, and which are in free, fair, and open competition with commodities of the same general class manufactured and distributed by others, and Retailer is engaged in the sale and distribution at retail of Manufacturer's "Identified Commodities" and of competitive commodities produced by others, and the parties hereto desire to avail themselves of the benefits of the Fair Trade Act enacted by the state in which Retailer does business, as shown above;

Now, Therefore, the parties do hereby stipulate and agree as follows:

1. Manufacturer's "Identified Commodities" shall mean and include all products listed in Manufacturer's current catalog or in any revision thereof which bear or the labels or containers of which bear the trade-marks, brands, or [fol. 16] name of Manufacturer and which are in free, fair, and open competition with commodities of the same general class produced or distributed by others.

2. Retailer hereby agrees not to sell, offer to sell, or advertise any of Manufacturer's "Identified Commodities" at less than the minimum retail resale prices therefor established by Manufacturer under Paragraph 3 hereof; provided, however, that such minimum retail resale prices shall not apply to sales made by Retailer to physicians,

dentists, veterinarians, hospitals, or state, county, or municipal institutions.

3. The minimum retail resale prices for Manufacturer's "Identified Commodities" shall be ten (10%) percent less than the List Prices respectively designated therefor in Manufacturer's current catalog or in any revision thereof, it being agreed that said catalog, together with any such revisions, shall be deemed to be incorporated herein as a part of this contract.

4. Manufacturer reserves the right to effect such changes in the "Identified Commodities" listed in its said catalog and in the minimum retail resale prices established therefor as it, in its sole discretion, may determine, and it is agreed that all such changes shall become effective and binding upon Retailer upon receipt of written or printed price revision sheets.

5. The following acts or practices shall be deemed to constitute a violation of Paragraph 2 hereof:

a. The giving by Retailer of anything of value, whether tangible or intangible, in connection with the sale of any of Manufacturer's "Identified Commodities."

b. The granting of any kind of a concession whatsoever in connection with the sale of Manufacturer's "Identified Commodities."

[fol. 17] c. The sale of any merchandise in combination with the sale of Manufacturer's "Identified Commodities."

6. Retailer agrees not to knowingly sell any of Manufacturer's "Identified Commodities" to any dealer who fails to observe the minimum retail resale prices established under Paragraph 3 hereof.

7. It is agreed that the minimum retail resale prices established under Paragraph 3 hereof shall not apply to any transaction specifically exempted from the operation of this Contract under the provisions of the Fair Trade Act of the state in which Retailer does business.

8. In consideration of the execution hereof by Retailer, it is agreed that to the extent permitted by law, Manufacturer will use every reasonable means to prevent the sale of its "Identified Commodities" by any dealer in competition with Retailer at prices less than the minimum retail resale prices established under Paragraph 3 hereof. In the performance of its obligations under this paragraph Manufacturer shall not be required to institute legal proceedings unless such action in Manufacturer's judgment is necessary and feasible, and in determining this question Manufacturer may take into account, among other things, the expense involved and the pendency of similar actions.

9. This Contract shall be interpreted under and shall be subject to the limitations imposed by the Fair Trade Act of the state in which Retailer does business, and in the event any provision of this Contract shall be held invalid under such Act or under any other statute, law, or public policy, or in the event this Contract shall be held inapplicable with respect to any given set of facts or circumstances, then, or in either of such events, the remaining provisions of this Contract and its applicability to all other sets of facts or circumstances shall be unaffected thereby.

[fol. 18] 10. This Contract shall apply only to the resale of Manufacturer's "Identified Commodities" by Retailer within the state in which Retailer does business.

11. This Contract shall remain and continue in full force and effect until and unless the same is terminated as hereinafter provided. Either party hereto may cancel or terminate this Contract by giving not less than thirty (30) days' notice in writing to the other party of his intention so to do. Any notice under this Contract given by either party to the other shall be sufficient if it is deposited in the United States Mail in a duly stamped envelope and addressed to the party hereto at the address designated in the opening Paragraph of this Contract. The termination of this Contract by Retailer, under the terms of this Paragraph, shall not relieve it of any obligation imposed under the Fair Trade Act of the state in which Retailer does business, nor shall either of the parties hereto, by virtue of

such termination, be deprived of any rights granted under such Act.

Executed this 22nd day of October, 1959.

Eli Lilly and Company
By H. B. Blackwell
Manufacturer

A & A Drug
By Rueben Adelstein
Retailer

Not effective until approved by an officer of Manufacturer at its Indianapolis office.

Approved: Eli Lilly and Company
By Eugene U. Beesley
President

[fol. 19]

Exhibit C to Answer and Cross Petition.

(Filed in Common Pleas Court February 29, 1960.)

Warning Letter from Defendant to Plaintiff
Dated December 10, 1959.

Eli Lilly and Company

Indianapolis 6, U. S. A.—Melrose 6-2211

December 10, 1959

Hudson Vitamin & Cosmetic Distributors, Inc.
415 Euclid Avenue
Cleveland 14, Ohio

Gentlemen:

We have been informed that you are selling Eli Lilly and Company products at prices below the minimum retail resale prices established for them in accordance with the provisions of the Ohio Fair Trade Act.

We are enclosing for your information duplicate copies of our regular form of Manufacturer-Retailer Fair Trade Contract which has been signed by a substantial number of retail druggists in the State of Ohio and in your com-
[fol. 20] munity and which is now in full force and effect. Under the provisions of these contracts, we have established minimum retail resale prices for our trademarked commodities at ten percent less than the list prices shown in our current Price List. You have been furnished with a copy of the Lilly Price List, and you are furnished with changes in this Price List at regular intervals.

Under the provisions of the Ohio Fair Trade Act, you are required to adhere to the minimum retail resale prices which we have established for our products, as explained above, even though you may not have signed one of our Manufacturer-Retailer Fair Trade Contracts.

We trust that your future operations will be strictly in accordance with the obligations imposed upon you under the Ohio Fair Trade Act, so that there will be no occasion for any further controversy or litigation.

Very truly yours,

Eli Lilly and Company
H. B. Blackwell
Legal Department

HBB:jw
Enclosure
Certified Mail

[fol. 21]

EXHIBIT D TO ANSWER AND CROSS PETITION.

(Filed in Common Pleas Court February 29, 1960.)

Second Warning Letter from Defendant to Plaintiff Dated January 26, 1960.

ELI LILLY AND COMPANY

Indianapolis 6, U. S. A.—MElrose 6-2211

January 26, 1960

Hudson Vitamin & Cosmetic Distributors, Inc.
415 Euclid Avenue
Cleveland 14, Ohio

Gentlemen:

We have again been informed that you are selling our products at prices below the minimum retail resale prices established for them in accordance with the provisions of the Ohio Fair Trade Act. Specifically, it has been reported that you are selling MI-CEBRIN (vitamin-mineral supplements, Lilly) 100's, for $4.38; MULTICEBRIN (pan-vitamins, Lilly) 100's, for $3.71; and MULTICEBRIN JR. (pan-vitamins, Lilly) 60's for $1.81, whereas the fair trade prices for these products are $5.98, $5.08, and $2.49, respectively.

You will recall that we wrote to you on December 10, 1959, concerning the sale of our products below the minimum retail resale prices; and we enclosed for your information duplicate copies of our Manufacturer-Retailer Fair Trade Contract. Under the terms of this contract we have established minimum retail resale prices for products bearing our trademarks, brands, or name at ten percent less than the list prices shown in our current Price List. Under the provisions of the Ohio Fair Trade Act you are obligated to uphold our minimum retail resale prices whether you have signed one of our contracts or not.

[fol. 22] It is our policy to employ all reasonable means to require the uniform observance of the minimum retail resale prices which we have established, and in our general

enforcement policy we are prepared to file suits for injunctions where contract violations cannot be adjusted on a voluntary basis.

We trust that your future operations will be in accordance with your obligations under the contracts and under the Ohio Fair Trade Act, so that there will be no occasion for further controversy or litigation.

Very truly yours,

ELI LILLY AND COMPANY
H. B. BLACKWELL
Legal Department

HBB:jj
Enclosure
Certified Mail-Return Receipt Requested

[fol. 23]

IN THE COURT OF COMMON PLEAS

ANSWER TO CROSS-PETITION—Filed April 21, 1960.

Now comes the plaintiff and for its answer to defendant's cross-petition, plaintiff admits the allegations contained in paragraph 3 of the cross-petition.

Plaintiff admits that defendant's products have been extensively advertised, but denies all other allegations of paragraph 4 of the cross-petition.

Plaintiff admits the allegations contained in paragraph 5 of the cross-petition.

Plaintiff denies the allegations contained in paragraph 6 of the cross-petition.

Plaintiff admits that defendant has notified plaintiff of defendant's purported establishment of minimum resale prices, but denies all other allegations of the cross-petition.

Plaintiff admits the allegations contained in paragraph 8 of the cross-petition.

Plaintiff admits that it has offered for sale and sold products bearing defendant's trademarks, but denies all other allegations of paragraph 9 of the cross-petition.

Plaintiff denies the allegations contained in paragraphs 10, 11, 12, 13 and 14 of the cross-petition.

Further answering, plaintiff denies each and every allegation of the cross-petition not herein expressly admitted to be true.

Wherefore, plaintiff prays that the relief prayed for in its second amended petition be granted and that defendant's cross-petition be dismissed at defendant's costs and for such other, further and supplemental relief as will be equitable in the premises.

Mendelsohn, Krotinger & Lane, By Myron N. Krotinger, By Leonard Lane, Attorneys for Plaintiff.

[fol. 24]

IN THE COURT OF COMMON PLEAS

AGREED STATEMENT OF FACTS—Filed June 10, 1960

It is agreed by and between the parties hereto that the following stated facts are true, but each of the parties reserves the right to object to the relevancy or materiality of any such fact or facts:

1. Plaintiff, Hudson Distributors, Inc., is a corporation duly organized and existing under and by virtue of the laws of the State of Michigan, with its principal place of business in Ohio located at 415 Euclid Avenue, Cleveland, Ohio, and is duly licensed to do business in the State of Ohio.

2. Defendant, Eli Lilly and Company, is a corporation duly organized and existing under and by virtue of the laws of the State of Indiana, and its District Manager has an office in the State of Ohio at 1139 Terminal Tower Building, Cleveland, Ohio.

3. Plaintiff is the owner and operator of a retail store in which plaintiff dispenses prescriptions and sells vitamins, drugs, patent and proprietary medicines, cosmetics, sundries and other similar items of merchandise, which are purchased by plaintiff in interstate commerce.

4. Defendant produces pharmaceuticals and other commodities which are sold by defendant in interstate com-

merce to wholesale pharmaceutical outlets only in the State of Ohio and throughout the United States.

5. Defendant's commodities are sold, offered for sale and advertised for sale in retail pharmaceutical outlets in the State of Ohio and throughout the United States.

6. All commodities produced by defendant are sold under defendant's trade name "Eli Lilly," and under other trademarks, trade names and brand names of defendant, such as "Homicebrin," "Multicebrin" and "Iletin," used for the purpose of identifying the products as having been produced by the defendant.

[fol. 25] 7. All commodities produced by defendant which are sold, offered for sale and advertised for sale in the State of Ohio are in free and open competition with commodities of the same general class produced by others and sold, offered for sale and advertised for sale in the State of Ohio.

8. Plaintiff purchases in interstate commerce commodities for resale, including commodities produced by the defendant, and sells, offers for sale and advertises for sale such commodities at retail in the State of Ohio.

9. Defendant has long maintained a policy of establishing minimum wholesale and retail resale prices for commodities produced by it pursuant to state fair trade laws, where such exist, and of enforcing such resale prices to the extent permitted by law.

10. The commodities produced by defendant have been widely and extensively promoted and advertised by defendant in the State of Ohio and throughout the United States, and defendant has expended large sums of money in such promotion and advertising.

11. Defendant's trademarks, trade names and brand names have become well and favorably known to the pharmaceutical trade, the medical profession and the public generally in the State of Ohio and throughout the United States as identifying commodities produced by defendant.

12. Under date of October 1, 1959, defendant notified plaintiff and all known Ohio retail pharmaceutical outlets

selling defendant's commodities in writing of its intention and policy to establish minimum retail resale prices for its commodities pursuant to the Ohio Fair Trade Act, Ohio Revised Code, Sections 1333.27 through 1333.34, and invited them to enter into written fair trade contracts with defendant. A true copy of such notification is attached to the Answer and Cross-Petition filed herein as "Exhibit A."

[fol. 26] 13. Prior to December 10, 1959, defendant had entered into written fair trade contracts which are still in full force and effect with numerous retail pharmaceutical outlets in Ohio, by the terms of which defendant established minimum retail resale prices for its commodities pursuant to the provisions of the Ohio Fair Trade Act and the retailer agreed not to sell, offer to sell or advertise for sale at retail defendant's commodities at prices less than the minimum retail resale prices so established. A true copy of such a contract is attached to the Answer and Cross-Petition herein as "Exhibit B."

14. Under date of December 10, 1959, defendant wrote plaintiff by certified mail that it had been informed plaintiff was selling defendant's commodities at prices below the minimum retail resale prices established by defendant for such commodities pursuant to the provisions of the Ohio Fair Trade Act, advised plaintiff that defendant had entered into written fair trade contracts with numerous Ohio retail pharmaceutical outlets by which defendant established minimum retail resale prices for its commodities pursuant to the provisions of the Ohio Fair Trade Act, and specified such prices to plaintiff, and invited plaintiff to enter into such a written contract with defendant. A true copy of such notification is attached to the Answer and Cross-Petition herein as "Exhibit C."

15. Under date of January 26, 1960, defendant wrote plaintiff by certified mail again advising plaintiff that defendant had entered into written fair trade contracts with numerous Ohio retail pharmaceutical outlets by the terms of which defendant established minimum retail resale prices for its commodities pursuant to the provisions of the Ohio Fair Trade Act, and again specifying such prices. A true copy of such notification is attached to the Answer and Cross-Petition herein as "Exhibit D."

16. Plaintiff has not entered into any written contract or agreement with defendant which would forbid plaintiff [fol. 27] from selling, offering for sale or advertising for sale commodities produced by defendant at prices less than the minimum retail resale prices established by defendant pursuant to the provisions of the Ohio Fair Trade Act.

17. Plaintiff purchased in interstate commerce and accepted commodities produced by defendant, and identified by defendant's trademarks, trade names or brand names, after the notifications to it described in paragraphs 14 and 15, above.

18. Plaintiff has sold, offered for sale and advertised for sale, and is selling, offering for sale and advertising for sale, commodities produced by defendant and so identified, which were purchased and accepted by plaintiff after such notifications to it described in paragraphs 14 and 15, above, at prices less than the minimum retail resale prices so established by defendant pursuant to the provisions of the Ohio Fair Trade Act.

19. Such sales, offerings for sale and advertisings for sale by plaintiff were not: (a) in closing out plaintiff's stock of such commodities for the purpose of discontinuing dealing therein; (b) of such commodities which were altered, second hand, damaged, defaced, or deteriorated; (c) by an officer acting under court order; or (d) of such commodities after removal of all traces of defendant's trademarks, trade names or brand names.

Mendelsohn, Krotinger & Lane, By Myron N. Krotinger, Attorneys for Plaintiff.

Henderson, Quail, Schneider & Peirce, By James I. Huston, Attorneys for Defendant.

[fol. 28]

IN THE COURT OF COMMON PLEAS

STIPULATION RE EVIDENCE—Filed June 25, 1960.

It is agreed by and between the parties hereto that the following documents are introduced into evidence in this cause, and both parties waive the right to object to the competency thereof but expressly reserve the right to object to the materiality or relevancy thereof:

1. Plaintiff's Exhibit 1—Affidavit of Bernard Shulman.

2. Plaintiff's Exhibit 2—Affidavit of Ernest C. T. Santora.

3. Plaintiff's Exhibit 3—Affidavit of S. Sterling McMillan.

4. Plaintiff's Exhibits 4, 5 and 6—Copies of the Lilly Digest for the years 1956, 1957 and 1958, respectively.

5. Plaintiff's Exhibits 7, 8 and 9—Price Lists of Eli Lilly and Company No. 67, effective January 2, 1956, No. 68, effective May 6, 1957, and No. 69, effective January 5, 1959, respectively.

6. Defendant's Exhibits A, B, C and D—Copies of letters and a contract, all attached to defendant's Answer and Cross-Petition.

7. Defendant's Exhibit E—Transcripts of the hearings of the Ohio General Assembly on House Bill No. 318, the Ohio Fair Trade Act, being hearings before the Ohio House Judiciary Committee on April 15, April 22 and April 29, 1959, and before the Ohio Senate Judiciary Committee on May 28, June 4 and June 9, 1959.

8. Defendant's Exhibit F—Affidavit of J. H. Rushton.

9. Defendant's Exhibit G—Affidavit of William R. Hutchinson.

[fol. 29] 10. Plaintiff's Exhibit 10—Eli Lilly and Company, Report to the Stockholders—1959.

Mendelsohn, Krotinger & Lane, By Myron N. Krotinger, Attorneys for Plaintiff.

Henderson, Quail, Schneider & Peirce, By James I. Huston, Attorneys for Defendant.

Plaintiff's Exhibit 1 to Stipulation

Affidavit of Bernard Shulman.

State of Michigan,
County of Wayne, ss.

Bernard Shulman, being first duly sworn, according to law deposes and says that he is the President of Hudson Distributors, Inc. and other corporations which operate drug stores and retail outlets which sell products manufactured by Eli Lilly and Company and other commodities generally sold by drug stores in the Norwood, Cincinnati, Dayton, Columbus, Cleveland and Youngstown areas.

Affiant further says that he is a registered pharmacist and has been in the retail drug business for twenty-two (22) years; that because of his experience in this field of business, he has a wide and general knowledge of the retail drug and cosmetic business and is thoroughly familiar with and has for many years sold the line of drugs manufactured by Eli Lilly and Company.

Affiant further says that during the years in which he has been active in the retail drug business, the sales of Eli Lilly and Company products in the City of Cleveland and the State of Ohio and throughout the nation have increased steadily. The national net sales of Eli Lilly and Company [fol. 30] have increased from $119,670,000.00 in 1950 to $199,800,000.00 in 1957, with a slight decrease in the business recession year of 1958 to $180,470,000.00, with a raise again in 1959 to $187,010,000.00. These increases have oc-

curred although fair trade statutes have not been enacted or are not enforceable against non-signers in some twenty (20) states and in the District of Columbia.

Affiant further says that Hudson Distributors, Inc., the plaintiff in this action, does not purchase any of the products of Eli Lilly and Company from the defendant. Hudson Distributors, Inc. buys products of Eli Lilly and Company for resale to the public from Regal D. S., Inc., a Michigan corporation located in the City of Detroit; that the said Regal D. S., Inc. is a warehouse company engaged in the sale of drugs and cosmetics to Hudson Distributors, Inc. and other companies of which affiant is President.

Affiant further says that Regal D. S., Inc. sells products manufactured by Eli Lilly and Company to Hudson Distributors, Inc. as a part of its regular course of business in interstate commerce. Hudson Distributors, Inc. purchases products of Eli Lilly and Company in anticipation of the resale of such commodities to the consuming public. Purchases by Hudson Distributors, Inc. are made from Regal D. S., Inc. at regular weekly intervals with the shipment of the products of Eli Lilly and Company being made regularly from the State of Michigan to the State of Ohio for resale by the plaintiff.

Affiant further says that the policy of Hudson Distributors, Inc. and its affiliates is to sell goods at a price which brings it a reasonable profit. Hudson Distributors, Inc. has not and does not engage in "loss leader merchandising" or "bait advertising" of any kind. All of the products retailed by Hudson Distributors, Inc. are sold at a profit to the plaintiff. The method of doing business of Hudson Distributors, Inc. permits it to engage in a profitable course of business and to sell products at prices lower than those [fol. 31] set by Eli Lilly and Company and by other persons, firms and corporations engaged in the manufacture of drugs and cosmetics because Hudson Distributors, Inc. has kept its operating costs at a level which permit such merchandising.

Affiant further says that the plaintiff is the beneficiary of Hudson's method of doing business. Goods are made available to great numbers of people at prices which permit a constantly greater percentage of the population to

enjoy the benefits of a large participation in the production bounty of the United States at a lower cost. The result has been to create a constantly expanding market for the products of Eli Lilly and Company and other manufacturers of drugs and cosmetics among people who otherwise could not afford them.

Affiant further says that no attempt has been made by Hudson Distributors, Inc. to monopolize the retail drug field or to institute a price war, and since it began business in Cleveland there has been no monopoly of the retail field or a price war in the City of Cleveland or its environs. Neither has there been a monopoly of the retail field or a price war in any of the other areas in which Hudson Distributors, Inc. and its affiliates operate drug stores or retail outlets. No price war can result from the sales activities of Hudson Distributors, Inc. because Hudson Distributors, Inc. never sells below its wholesale cost.

Affiant further says that the dollar volume of sales of Eli Lilly and Company products have not decreased in the Cleveland area since Hudson Distributors, Inc. started its operations, but, on the contrary, these sales have steadily increased in volume since 1957. The reputation for excellence of production of Eli Lilly and Company products and the consumer appeal of such products have steadily increased for the years 1957, 1958, 1959 and 1960 to date despite the fact that in January, 1958, the Ohio Supreme Court declared the old Fair Trade Law unconstitutional [fol. 32] insofar as it attempted to bind non-signers of fair trade contracts to so-called fair trade prices. The sales experience of Eli Lilly and Company has been continuously favorable in the territory of northern Ohio where Hudson Distributors, Inc. is operating although there has not been a time when the sale of products of Eli Lilly and Company did not take place at prices below the manufacturer's suggested retail price.

Affiant further says that no drug store or retail outlet in the City of Cleveland has discontinued the sale of Eli Lilly and Company products due to the activities of Hudson Distributors, Inc. Furthermore, since Eli Lilly and Company is one of the largest producers of drugs and related products in the United States, no business dealing in drugs

can afford to discontinue the sale of the products distributed by Eli Lilly and Company.

Affiant further says that the sale of Eli Lilly and Company products by Hudson Distributors, Inc. has not and cannot result in injury to Eli Lilly and Company as evidenced by the fact that no injury whatsoever was suffered by Eli Lilly and Company during the period of time that the State of Ohio did not have a Fair Trade Law.

Affiant further says that the consuming public has come to recognize that Hudson Distributors, Inc., through its economical operations, is able to sell various commodities in its store at prices below those generally charged in the field. The activities of Hudson Distributors, Inc. have been beneficial to the consuming public and to Eli Lilly and Company by creating a wider market for the products of Eli Lilly and Company at a reasonable price.

Further Affiant saith not.

BERNARD SHULMAN.

(Jurat omitted.)

[fol. 33]

PLAINTIFF'S EXHIBIT 2 TO STIPULATION

Affidavit of Ernest C. T. Santora.

STATE OF OHIO,
COUNTY OF CUYAHOGA, SS.

ERNEST C. T. SANTORA, being first duly sworn according to law, deposes and says that:

1. He is a partner in the firm of Mendelsohn, Krotinger, Lane, Santora and Shaw, Attorneys-at-Law, 218 Chester-Twelfth Building, Cleveland 14, Ohio, Attorneys for Plaintiff.

2. He has obtained from Hudson Distributors, Inc., the monthly sales figures for the total sales of proprietary drugs, the sales of Lilly proprietary drugs, the total sales of prescription drugs, the sales of Lilly prescription drugs, the total sales of vitamins, the sales of Lilly vitamins and the sales of Revco vitamins from the date it began operations in May 1958.

3. The percentage increases in the sales of proprietary drugs for the year beginning May, 1959 and ending April, 1960 over the comparable 1958-1959 period are as follows:

Total sales of proprietary drugs	38.5%
Sales of Lilly proprietary drugs	144.4%

4. Hudson Distributors, Inc. did not start its prescription department until June, 1959.

5. The percentage of prescription drugs sold with relation to the total of proprietary and prescription drug sales per month is as follows:

[fol. 34]

June, 1959	1.0%
July, 1959	5.0%
August, 1959	7.0%
September, 1959	8.6%
October, 1959	9.9%
November, 1959	11.6%
December, 1959	13.8%
January, 1960	14.0%
February, 1960	16.5%
March, 1960	16.4%
April, 1960	18.8%
May, 1960	19.3%

6. The percentage of Lilly prescription drugs sold with relation to the total of Lilly proprietary and Lilly prescription drug sales per month is as follows:

June, 1959	0.6%
July, 1959	2.5%
August, 1959	3.4%
September, 1959	3.8%
October, 1959	4.1%
November, 1959	4.4%
December, 1959	5.5%
January, 1960	5.6%
February, 1960	6.8%
March, 1960	6.7%
April, 1960	7.9%
May, 1960	8.1%

7. The percentage increases in these sales of vitamins for the year beginning May, 1959 and ending April, 1960, over the comparable 1958-1959 period are as follows:

Total sales of vitamins	42.8%
Sales of Lilly vitamins	38.0%

8. Hudson did not begin the distribution of Revco vitamins until June of 1959.

[fol. 35] 9. The percentage of Revco vitamins sold with relation to the Lilly vitamins sales per month is as follows:

June, 1959	10.3%
July, 1959	13.9%
August, 1959	15.5%
September, 1959	18.1%
October, 1959	20.6%
November, 1959	23.3%
December, 1959	25.8%
January, 1960	33.4%
February, 1960	25.7%
March, 1960	33.3%
April, 1960	33.6%
May, 1960	33.5%

10. The percentage of Revco Vitamins sold with relation to the total vitamin sales per month is as follows:

June, 1959	1.8%
July, 1959	2.0%
August, 1959	2.7%
September, 1959	3.2%
October, 1959	3.5%
November, 1959	3.6%
December, 1959	4.5%
January, 1960	5.8%
February, 1960	4.5%
March, 1960	5.8%
April, 1960	5.9%
May, 1960	5.9%

11. All products sold by Hudson Distributors, Inc. are sold at a profit and at the same mark-up. No products are

used as "loss leaders" or "bait merchandise." The profits on the sale of one item are in no way used to finance the sale of any other item.

12. In addition, the growth and percentage of sales of prescription drugs with relation to the total of proprietary [fol. 36] and prescription drug sales in the twelve month period since Hudson Distributors, Inc. established a Prescription Department illustrates the utility of the Prescription Department of Hudson Distributors, Inc.

13. Further, affiant saith not.

ERNEST C. T. SANTORA.

(Jurat omitted.)

[fol. 37]

DEFENDANT'S EXHIBIT E TO STIPULATION

(Filed in Common Pleas Court June 25, 1960.)

Transcripts of the hearings of the Ohio General Assembly on House Bill No. 318, the Ohio Fair Trade Act, being hearings before the Ohio House Judiciary Committee on April 15, April 22 and April 29, 1959, and before the Ohio Senate Judiciary Committee on May 28, June 4 and June 9, 1959.*

(* Clerk's Note—Such Transcripts are printed in the Record in Hudson Distributors, Inc. v. [redacted] 489 in the Supreme Court of the United States.) UPJOHN CO.

[fol. 38]

DEFENDANT'S EXHIBIT F TO STIPULATION

Affidavit of J. H. Rushton.

STATE OF INDIANA,
COUNTY OF MARION, ss.

J. H. RUSHTON, being first duly sworn, says that:

1. He is the manager of the Accounting Analysis Department of defendant herein, Eli Lilly and Company, and

as such is familiar with the product lines of Eli Lilly and Company and with the record of its sales.

2. The following figures showing the sales trends of four product lines of Eli Lilly and Company nationally, in Ohio and in Cleveland were prepared in his Department and under his supervision.

3. The product line designated "Iletin" is the insulin line of Eli Lilly and Company, and includes its preparations known as "Regular Iletin," "Lente Iletin," "NPH Iletin" and "Protamine, Zinc & Iletin."

The product line designated "Vitamins" is the oral and injectory vitamin line of Eli Lilly and Company, and includes its preparations known as "Mi-Cebrin," "Multicebrin," "Homicebrin," "Procebrin" and "Vi-Mix Drops"; over 90% of the sales in this product line are of the oral vitamin preparations.

[fol. 39] The product line designated "V-Cillin" is the penicillin V (acid form) line of Eli Lilly and Company, and includes its preparations known as "V-Cillin" and "V-Cillin Drops" as well as "V-Cillin K" (Penicillin V-Potassium).

The product line designated "Ilotycin-Ilosone" is a line of antibiotics of Eli Lilly and Company and includes its preparations known as "Ilotycin," "Ilotycin Sulfa," "Ilosone" and "Ilosone Lauryl Sulfate Drops."

4. The Iletin and oral Vitamin product lines are sold at retail without a physician's prescription. The sales of these product lines are fairly representative of the sales of all pharmaceuticals produced by Eli Lilly and Company which are sold at retail without prescription.

5. The V-Cillin and Ilotycin-Ilosone product lines are sold at retail only on a physician's prescription. The sales of these product lines are fairly representative of the sales of all pharmaceuticals produced by Eli Lilly and Company which are sold at retail on prescription only.

6. The percentage increases or decreases of the sales of these product lines for the year 1958 over the year 1957 to wholesalers nationally, in Ohio and in Cleveland are as follows:

Product Line	Trend of Sales Nationally	Trend of Sales In Ohio	Trend of Sales in Cleveland
Iletin	— 3.9%	— 7.9%	— 8.2%
Vitamins	3.6	— .7	— 5.7
V-Cillin	— 7.1	—13.5	—12.3
Ilotycin-Ilosone	28.4	21.6	7.6

7. The percentage increases and decreases of the sales of these product lines for the year 1959 over the year 1958 to wholesalers nationally, in Ohio and in Cleveland are as follows:

[fol. 40]

Product Line	Trend of Sales Nationally	Trend of Sales In Ohio	Trend of Sales in Cleveland
Vitamins	4.8	4.0	— 5.6
Iletin	3.2%	1.7%	— 3.5%
V-Cillin	— 8.3	— 8.6	—12.3
Ilotycin-Ilosone	24.0	31.3	37.8

8. The percentage increases or decreases of the sales of all pharmaceuticals produced by Eli Lilly and Company (including the four product lines specified above) for 1958 over 1957, and for 1959 over 1958 to wholesalers nationally, in Ohio and in Cleveland are as follows:

	Trend of Sales Nationally	Trend of Sales In Ohio	Trend of Sales in Cleveland
1958 over 1957— all products	—13.5%	—13.9%	22.0%
1959 over 1958— all products	6.3	7.3	3.9

J. H. Rushton,

(Jurat omitted.)

[fol. 41]

DEFENDANT'S EXHIBIT G TO STIPULATION.

(Filed in Common Pleas Court June 25, 1960.)

Affidavit of William R. Hutchinson.

WILLIAM R. HUTCHINSON, being first duly sworn, deposes and says that:

1. He is the Director of Sales, East-Central Region, of Eli Lilly and Company, which territory includes the State of Ohio and the City of Cleveland; and that he is familiar with the business of Eli Lilly and Company generally, including its promotional and advertising programs and its trade relationships and specifically its business in Ohio and in the Cleveland area.

2. The pharmaceuticals and other commodities produced by Eli Lilly and Company are sold directly to authorized wholesalers. There are eleven authorized wholesalers in Ohio. The authorized wholesalers in Cuyahoga County, Ohio, are McKesson & Robbins Company and Cleveland Wholesale Drug. The products of Eli Lilly and Company are sold and distributed by the wholesalers to retail pharmaceutical outlets from which such commodities are sold at retail.

3. Eli Lilly and Company extensively promotes and advertises its commodities nationally and at the local level promotes its products to the medical profession, hospitals and retail pharmaceutical outlets.

4. Eli Lilly and Company has acquired and possesses a valuable reputation and goodwill with the medical profession, the retail pharmaceutical trade and the public generally which is attached to its trademarks, trade names and brand names.

5. By reason of the goodwill Eli Lilly and Company enjoys with the retail pharmaceutical trade, its commodities have been widely advertised, promoted, displayed and recommended by such retail pharmaceutical outlets to their customers.

[fol. 42] 6. When the new Ohio Fair Trade Act was enacted by the Ohio General Assembly, Eli Lilly and Company entered into a number of fair trade contracts with Ohio retail pharmaceutical outlets which established minimum retail resale prices for commodities produced by Eli Lilly and Company. There are over 1,420 such contracts now in effect in the State of Ohio. About 65% of the retail pharmaceutical outlets in the State of Ohio, and about 50% of the retail pharmaceutical outlets in the Cleveland area, have entered into such fair trade contracts. All such contracts are in the form of the contract attached to the Answer and Cross Petition herein as "Exhibit B."

7. The plaintiff, Hudson Distributors, Inc., has followed a policy of wilfully and knowingly selling commodities produced by Eli Lilly and Company in the Cleveland area at prices less than the minimum retail resale prices established by Eli Lilly and Company.

8. Eli Lilly and Company has received numerous written communications from Cleveland retail pharmaceutical outlets which observe its legally established minimum retail resale prices complaining of the plaintiff's practice of not observing such practices. I personally have received a number of similar complaints orally, and oral complaints which have been made to my staff by retail pharmaceutical outlets in Ohio and in the Cleveland area have been passed on to me.

9. Some retail pharmaceutical outlets in the Cleveland area which would otherwise observe the established minimum retail resale prices for Eli Lilly and Company commodities have been forced by reason of plaintiff's price cutting to sell such commodities at prices below the established minimum retail resale prices.

10. In the affiant's opinion, plaintiff is able to cut the prices on Eli Lilly and Company commodities for a number of reasons, including low overhead costs, large volume of sales, the lack of services offered the customer, and the [fol. 42a] realization of a higher margin of profit on other goods carried by the plaintiff which have no national trademark and are not nationally advertised and priced.

11. Many Cleveland retail pharmaceutical outlets cannot compete with a store such as plaintiff's, because of plaintiff's pricing policy, and will either discontinue selling Eli Lilly and Company commodities entirely, or will not exert any effort towards the sale of Eli Lilly and Company commodities. In some cases a retailer in this situation will recommend off-brand products which are not fair traded rather than lose a customer to buy a fair traded item at a store such as plaintiff's.

12. The marketing of commodities such as those produced by Eli Lilly and Company depends on a widespread distribution system with as great a number of retail outlets as possible. The loss of retail pharmaceutical outlets in Ohio and in the Cleveland area will weaken the distribution system of Eli Lilly and Company, and will result in decreased sales.

13. The action of Cleveland retail pharmaceutical outlets in no longer displaying and promoting Eli Lilly and Company commodities by reason of the unfair competition of plaintiff's store has contributed to a decrease in sales by Eli Lilly and Company in the Cleveland area of the kind of commodities which are sold by plaintiff.

14. The fact that an Eli Lilly and Company commodity is sold in the Cleveland area for one price in plaintiff's store and for another price in the retail pharmaceutical outlet observing the established minimum retail resale price causes confusion in the consumer's mind as to the true value of that commodity. Complaints have been made to my office and to my staff concerning the different prices charged for Eli Lilly and Company commodities in the Cleveland area, and Eli Lilly and Company has thereby suffered a loss of goodwill with the buying public.

William R. Hutchinson.

(Jurat omitted.)

[fol. 43]

In the Court of Common Pleas

Docket and Journal Entries

October 22, 1959 Petition and precipe filed and summons issued, and a copy of petition by certified mail—mailed to Mark McElroy, Attorney General for the State of Ohio.

October 24, 1959 Certified Mail receipt returned endorsed by Attorney General and filed.

October 31, 1959 Summons returned, endorsed: on the 22nd day of October 1959 I served this writ on the within named Eli Lilly and Company, a corporation by [fol. 44] handing to Martha Wilson, Office Manager, a true and certified copy thereof with all the endorsements thereon, The President or other chief officer of said company not found in my county. Also on the 23rd day of October 1959 I served this writ on the within named Eli Lilly and Company a Corporation, by sending to their last known address 740 South Alabama Street Indianapolis, Indiana by registered mail, postage prepaid, a true and certified copy thereof with all the endorsements thereon. The signed return receipt No. 773421 is hereto attached and goes to make a part of the return of service of this writ. Sheriff's Fees: $2.34.

November 19, 1959 Consent granted defendant to move or plead by December 21, 1959.

December 21, 1959 Demurrer of Defendant filed.

January 11, 1960 Amended petition for declaratory judgment filed.

January 29, 1960 Consent granted defendant to move or plead by February 29, 1960.

February 24, 1960 To Court: Amended Petition having been filed, Demurrer to the petition stricken. Signed Joseph H. Silbert, Judge. (Civil Journal 350, page 539.)

February 29, 1960 Answer and Cross Petition by defendant filed.

March 10, 1960 Motion for temporary injunction by defendant filed.

March 31, 1960 To Court: Motion of Defendant to advance granted. Cause ordered advanced to trial list for May 11, 1960. (Civil Journal 350, page 961.)

April 21, 1960 Answer to Cross petition by Plaintiff filed.

June 10, 1960 Agreed statement of facts filed.

June 10, 1960 Brief in support of petition by plaintiff filed.

June 23, 1960 Brief of defendant in support of the validity of The Ohio Fair Trade Act filed.

[fol. 45] June 24, 1960 Affidavit of service filed.

June 25, 1960 Stipulation filed.

July 7, 1960 Reply to brief of defendant filed.

July 28, 1960 Opinion of the Honorable Eugene McNeill filed.

JUDGMENT—July 28, 1960

To Court: This cause came on to be heard upon the pleadings, the evidence, the oral argument of counsel, and upon the briefs submitted by counsel of record and amicus curiae.

The Court finds that it has jurisdiction of the parties hereto, of the subject matter of the action, and that all things have properly been done to bring the subject and all parties before the Court.

The Court finds that there has been an enactment in the State of Ohio of R. C. 1333.27-1333.34, inclusive entitled "Fair Trade and Minimum Resale Prices" effective October 22, 1960, and that said act permits a producer or distributor trade-marking or trade-naming an article for retail sale which is in free and open competition with the same general class produced by others and offered for sale in the same general market area, or their designees, to control by notice to distributors, or by contract stipulated minimum resale prices for such commodities; that no standards or limitation of any type is provided to control the discretion of said person setting said price, and that therefore, said act is in violation of Section I, Article 2 of the Constitution of the State of Ohio;

That said provisions are an integral and inseparable part of said act and because thereof, R. C. 1333.27-1333.34, inclusive, are in violation of the Constitution of the State of Ohio, and are of no force and effect; that plaintiff's rights in the sale of its property are affected thereby; and that there is a controversy and judiciable issue before the Court.

It Is Therefore Ordered, Adjudged and Decreed that R. C. 1333.27-R. C. 1333.34, inclusive, of the State of Ohio, [fol. 46] are violative of Section I, Article 2 of the Constitution of the State of Ohio, and therefore are void and are not binding upon the plaintiff herein. It is further ordered that the cross petition of defendant be, and the same hereby is dismissed, at the costs of the defendant herein. Exceptions allowed. Signed Eugene R. McNeill, Judge (By Assignment) Received for filing, July 28, 1960. Emil J. Masgay, Clerk of Courts By H. Kwarciany, Deputy. (Civil Journal 351, page 1266.)

August 16, 1960 Notice of Appeal filed by Defendant Eli Lilly & Company together with precipe. (Law.)

(Duly Certified.)

In the Court of Common Pleas

Opinion, McNeill, J., in the cases of *Hudson Distributors, Inc.* v. *The Upjohn Company,* No. 727,805 and *Hudson Distributors, Inc.* v. *Eli Lilly & Company,* No. 730,118, dated July 28, 1960 (printed in companion case of *Hudson Distributors, Inc.* v. *The Upjohn Company,* No. 489 in the Supreme Court of the United States).

In the Court of Appeals

Opinion, Skeel, J., and Dissenting Opinion, Hurd, J., in the cases of *Hudson Distributors, Inc.* v. *The Upjohn Company,* No. 25,371 and *Hudson Distributors, Inc.* v. *Eli Lilly & Company,* No. 25,374, dated July 13, 1961 (printed in

companion case of *Hudson Distributors, Inc.* v. *The Upjohn Company*, No. 489 in the Supreme Court of the United States).

[fol. 47]

IN THE COURT OF APPEALS

EIGHTH DISTRICT, CUYAHOGA COUNTY, OHIO

No. 25,374.

HUDSON DISTRIBUTORS, INC., Plaintiff-Appellee,

vs.

ELI LILLY & COMPANY, Defendant-Appellant.

PETITION FOR REHEARING—Filed in the Court of Appeals July 17, 1961

Now comes the plaintiff-appellee and petitions this Honorable Court for a rehearing on the following grounds:

1. This Honorable Court does not appear to have considered the impact of the "Supremacy Clause" of the Federal Constitution (Article VI, Constitution of the United States) upon the validity of Sections 1333.27 through 1333.34 inclusive of the Ohio Revised Code. The Congress of the United States has clearly indicated that a Congressional Amendment to the McGuire Act is required to authorize implied "fair trade" contracts by notice, as provided by the New Ohio Fair Trade Law. Section 5(a)(2) and Section 5(a)(3) of the McGuire Act, as presently in force, permit the enactment of state legislation authorizing only consensual contracts or agreements prescribing "fair trade" prices.

2. This Honorable Court does not appear to have considered that the plaintiff herein purchased the goods manufactured by the defendants from a third party wholesaler located outside of Ohio, which did not require that defendants' goods be sold at defendants' respective stipulated

[fol. 48] retail prices. Although this Honorable Court did discuss the effect of Section 1333.27 through 1333.34 inclusive, Ohio Revised Code, in creating an implied contract where the manufacturer or distributor who has fixed minimum retail prices has resold the product to the retailer, the Court does not appear to have discussed creation of an implied contract under the stipulated facts of this case, i.e., where all of plaintiff's goods were purchased from outside of Ohio from a wholesaler who did not seek to set minimum retail prices.

3. This Honorable Court did not discuss the effect on the New Ohio Fair Trade Act of Section 5(a)(5) of the McGuire Act which prohibits contracts or agreements which provide for the establishment or maintenance of "horizontal" minimum or stipulated resale prices of any commodity between persons, firms or corporations which are in competition with each other.

In direct contravention of Section 5(a)(5) of the McGuire Act and of the Supremacy Clause of the United States Constitution, Section 1333.29 (a) of the Ohio Revised Code, as an integral and inseparable portion of the Fair Trade Act, permits a proprietor to establish retail and wholesale fair trade prices, and control minimum wholesale prices for a commodity of which he is the proprietor, even though the price-setting proprietor sells such fair traded commodities to retailers in competition with such wholesalers.

Wherefore, it is prayed that this Honorable Court grant this Petition for Rehearing.

Respectfully submitted,

Lane, Krotinger & Santora, By Myron N. Krotinger, By Leonard Lane, Attorneys for Plaintiff-Appellee.

[fol. 49]

In the Court of Appeals

Docket and Journal Entries

Docket and Journal Entries In the Court of Appeals

August 26, 1960. Transcript and original papers from Common Pleas Court, filed.

October 24, 1960. Defendants Bill of Exceptions, filed. (4 Vols.)

December 31, 1960. Motion to file brief amicus curiae. 1 copy filed.

January 10, 1961. To Court: Motion by Ohio Hardware Association, The Cleveland Academy of Pharmacy, Ohio Retail Food Dealers, Ohio Association of Tobacco Distributors, Ohio Retail Jewelers Association, and the Ohio State Pharmaceutical Association for permission to file brief amicus curiae instanter granted. Exceptions. Signed Joy Seth Hurd, Presiding Judge. (Journal 25, page 11.)

January 19, 1961. Assignment of error and brief of Defendant-Appellant Eli Lilly and Company, (2) copies, filed.

January 26, 1961. Motion to file brief Amicus Curiae, filed.

January 31, 1961. To Court: Motion by Bargain Fair, Inc. and Claber Distributing Company, Inc. to file combined brief amicus curiae herein granted. Exceptions. Signed Joy Seth Hurd, Presiding Judge. (Journal 25, page 32.)

February 24, 1961. Answer Brief of Plaintiff-Appellee (2) copies, filed.

March 27, 1961. Reply Brief of Defendant-Appellant (2) copies, filed.

May 3, 1961. Brief Amicus Curiae on behalf of Bargain Fair, Inc., and Claber Distributing Company, Inc., D.B.A. "Uncle Bills" (2) copies, filed.

May 20, 1961. Memorandum Brief of Defendant-Appellant in reply to brief Amicus Curiae (2) copies, filed.

[fol. 50] July 17, 1961. Plaintiff-Appellee's petition for rehearing and brief in support thereof, (2) copies, filed.

September 8, 1961. Brief of Defendant-Appellant in opposition to petition for rehearing, (2) copies, filed.

Order Denying Petition for Rehearing

September 21, 1961. To Court: Petition by plaintiff-appellee for rehearing denied. Joy Seth Hurd, Judge dissents. Signed Julius M. Kovachy, Presiding Judge. (Journal 25, page 274.)

Judgment—September 27, 1961

To Court: This cause came on to be heard upon appeal on questions of law from the judgment of the Court of Common Pleas of Cuyahoga County, the assignment of error, bill of exceptions, transcript of the docket and journal entries in the Court of Common Pleas of Cuyahoga County, and briefs, and was argued by counsel and submitted to the Court.

Upon consideration whereof, the Court finds that the Court of Common Pleas of Cuyahoga County erred to the prejudice of the Defendant-Appellant in declaring Sections 1333.27 through 1333.34 of the Ohio Revised Code violative of the Constitution of the State of Ohio, and therefore void and not binding upon the Plaintiff-Appellee, and in granting judgment for the Plaintiff-Appellee on its petition and dismissing the cross petition of the Defendant-Appellant.

The Court further finds that Sections 1333.27 through 1333.34 of the Ohio Revised Code are valid, lawful, and enforceable enactments of the Ohio General Assembly and do not violate the Constitution of the State of Ohio or the Constitution of the United States, or any law of the United States.

It is therefore considered, ordered and adjudged that the judgment of the Court of Common Pleas of Cuyahoga County be and the same is hereby reversed and held for naught. And the Court coming now to render the judgment which the Court of Common Pleas of Cuyahoga County ought to have rendered, it is considered, ordered and ad-
[fol. 51] judged that Sections 1333.27 through 1333.34 of the Ohio Revised Code be and the same hereby are declared to be valid, lawful and enforceable enactments of the Ohio General Assembly and not to be in violation of the Constitution of the State of Ohio or of the Constitution of the United States or of any law of the United States; that final

judgment be and the same hereby is now entered in this Court for the Defendant-Appellant on the petition filed in this cause in the Court of Common Pleas of Cuyahoga County by the Plaintiff-Appellee; that this cause be remanded to the Court of Common Pleas of Cuyahoga County to carry this judgment into effect and for execution, and for further proceedings according to law with respect to the cross-petition filed in this cause by the Defendant-Appellant; and that the Defendant-Appellant recover from the Plaintiff-Appellee its costs herein expended.

To all of which the Plaintiff-Appellee, by its counsel, excepts. Signed Julius M. Kovachy, Presiding Judge. (Journal 25, page 281.)

September 29, 1961. Notice of Appeal to the Supreme Court of Ohio filed by Plaintiff (Appellee) on constitutional question and condition on motion to certify.

(Duly certified.)

In the Supreme Court of Ohio

Opinion, Griffith, J., and Dissenting Opinion, Zimmerman, J., in the cases of *Hudson Distributors, Inc.* v. *The Upjohn Company*, No. 37,320 and *Hudson Distributors Inc.* v. *Eli Lilly & Company*, No. 37,321, dated May 8, 1963 (printed in companion case of *Hudson Distributors, Inc.* v. *The Upjohn Company*, No. 489 in the Supreme Court of the United States).

[fol. 52]

In the Supreme Court of Ohio

Journal Entries

Judgment—May 8, 1963

Journal 45, Page 555

Appeal from the Court of Appeals for Cuyahoga County

This cause, here on appeal from the Court of Appeals for Cuyahoga County, was heard in the manner prescribed by law. On consideration thereof, the judgment of the Court

of Appeals is affirmed; and it appearing that there were reasonable grounds for this appeal, it is ordered that no penalty be assessed herein.

It is further ordered that the defendant appellee recover from the plaintiff appellant its costs herein expended; that a mandate be sent to the Court of Common Pleas to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Cuyahoga County for entry.

[fol. 53]

ORDER DENYING REHEARING—June 12, 1963

Journal 45, Page 623

It is ordered by the Court that rehearing in these cases are denied.

[fol. 54] [File endorsement omitted]

[fol. 55]

IN THE SUPREME COURT OF OHIO

Appeal From
The Court of Appeals of Cuyahoga County,
Eighth Judicial District

No. 37,321

HUDSON DISTRIBUTORS, INC., Plaintiff-Appellant,

vs.

ELI LILLY & COMPANY, Defendant-Appellee.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed August 1, 1963

I. Notice is hereby given that Hudson Distributors, Inc., the appellant above named, hereby appeals to the Supreme Court of the United States from the final judgment of the

Supreme Court of Ohio entered in this action on June 12, 1963 denying appellant's application for rehearing of the judgment of the Supreme Court of Ohio rendered on May 8, 1963, which had affirmed the judgment of the Court of Appeals of Cuyahoga County.

This appeal is taken pursuant to 28 U.S.C. §1257 (2).

II. The clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in the said transcript all pleadings, original papers, testimony and evidence offered, heard and taken into consideration in rendering the judgment aforesaid.

[fol. 56] III. The following questions are presented by this appeal:

1. Whether the Ohio Fair Trade Act violates the Supremacy Clause of the Federal Constitution in that:

(a) The Act attempts to repeal Section 5(a)(5) of the McGuire Act and Section 1 of the Sherman Anti-Trust Act by authorizing the proprietor of a trademark or trade name to establish minimum resale prices for wholesalers with whom the proprietor is in competition;

(b) The Act attempts to repeal Section 5(a)(5) of the McGuire Act and Section 1 of the Sherman Anti-Trust Act by authorizing the proprietor of a trademark or trade name to compel its distributors to enter into "horizontal" (i.e. at the same level of distribution), price fixing agreements or unlawful boycotting arrangements with other distributors;

(c) The Act attempts to repeal Sections 5 (a)(2), (3), (4) and (5) of the McGuire Act and Section 1 of the Sherman Anti-Trust Act by authorizing the proprietor of a trademark or trade name to establish minimum resale prices by notice to distributors without the consensual agreement intended by Congress.

2. Whether the Ohio Fair Trade Act is unconstitutional under the Due Process Clause of the 14th Amendment to

the Federal Constitution in that the Act confers upon the proprietor of a trademark or trade name a "proprietary interest" in a commodity despite the sale of and receipt of the full price for such commodity with the trademark or trade name affixed thereon, and by reason of such "proprietary interest" empowers the proprietor to compel a remote non-consenting vendee to adhere to a minimum resale price.

[fol. 57] 3. Whether the federally unconstitutional provisions of the Ohio Fair Trade Act are so commingled and intertwined with the remainder of the Act and so inseparable therefrom as to make the entire Act unconstitutional under the Federal Constitution.

Lane, Krotinger & Santora, Attorneys for Plaintiff-Appellant, 300 Chester-Twelfth Building, Cleveland 14, Ohio, By Myron N. Krotinger.

[fol. 58] Proof of Service (omitted in printing).

[fol. 59] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 60]

SUPREME COURT OF THE UNITED STATES

No. 490—October Term, 1963

HUDSON DISTRIBUTORS, INC., Appellant,

vs.

ELI LILLY & COMPANY

ORDER NOTING PROBABLE JURISDICTION—December 9, 1963

Appeal from the Supreme Court of the State of Ohio.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted. The case is placed on the summary calendar and set for argument immediately following No. 489.

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In the Supreme Court of the United States

No. 490

OCTOBER TERM, 1963.

HUDSON DISTRIBUTORS, INC.,
Appellant,

v.

ELI LILLY & COMPANY,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO.

JURISDICTIONAL STATEMENT.

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In the Supreme Court of the United States

No. ________

OCTOBER TERM, 1963.

HUDSON DISTRIBUTORS, INC.,
Appellant,

v.

ELI LILLY & COMPANY,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO.

JURISDICTIONAL STATEMENT.

Appellant appeals from the judgment of the Supreme Court of Ohio entered on June 12, 1963 denying appellant's Application for Rehearing of the judgment of the Supreme Court of Ohio rendered on May 8, 1963 which had affirmed the judgment of the Court of Appeals of Cuyahoga County, Ohio. Appellant submits this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINIONS BELOW.

The Opinion of the Trial Court in this case, the Court of Common Pleas for Cuyahoga County, Ohio, is not officially reported. It is reported in 1960 C.C.H. Trade Cases Paragraph 69,778. The Opinion is printed in Appendix A hereto beginning at page 28. The judgment entered thereon is printed in Appendix A at page 38.

The Opinion of the Court of Appeals for Cuyahoga County, including the dissent, is reported in 117 Ohio App. 207. This Opinion is printed at pages 39 to 71, Appendix A. The Judgment entered thereon appears in Appendix A at page 71.

The Opinion of the Supreme Court of Ohio, including the dissent, is reported in 174 Ohio St. 487. This Opinion is printed at pages 73 to 86 in Appendix A. The Judgment entered thereon appears in Appendix A at page 86.

JURISDICTION.

The suit was brought by Hudson Distributors, Inc. ("Hudson"), in the Court of Common Pleas of Cuyahoga County, Ohio, against Eli Lilly & Company ("Lilly") under the Declaratory Judgment Statute of Ohio for a judgment declaring the 1959 Fair Trade Act to be null and void as violative of the Supremacy Clause (Article VI, Clause 2) of, and the Fourteenth Amendment to the Constitution of the United States, and repugnant to various provisions of the Constitution of the State of Ohio.

On July 28, 1960 the Court of Common Pleas of Cuyahoga County held that the Fair Trade Act of 1959 was unconstitutional under the Constitution of Ohio. The Federal grounds were not reached. The Court of Appeals for Cuyahoga County by a vote of 2 to 1 reversed the Court of Common Pleas on July 13, 1961 and sustained constitutionality.

Hudson then appealed the decision to the Supreme Court of Ohio. On May 8, 1963, the Ohio Supreme Court, without discussing the federal issues, affirmed the judgment of the Court of Appeals for Cuyahoga County by a vote of three justices in favor of affirmance and four justices against. Although a majority of the justices felt the Statute to be unconstitutional, the Ohio Supreme Court

could not so hold by reason of Article IV, Section 2 of the Ohio Constitution which requires that, except in affirmance of a judgment below, at least six members of the Supreme Court must be of the opinion that a State Statute is unconstitutional before the Court may so declare.

On May 22, 1963, Hudson filed its Petition for Rehearing in the Ohio Supreme Court which was denied by the Court on June 12, 1963. On August 1, 1963, Hudson filed in the Supreme Court of Ohio its Notice of Appeal to the Supreme Court of the United States, copies of which were also filed with the Court of Appeals of Cuyahoga County and the Court of Common Pleas of Cuyahoga County.

The Jurisdiction of the Supreme Court of the United States to review the decision by appeal from the judgment of the Supreme Court of the State of Ohio is conferred by Title 28, United States Code, Section 1257(2). This jurisdiction is sustained by *Metlakatla Indian Community; Annette Islands Reserve v. Egan*, 369 U. S. 45 (1962) and *Reconstruction Finance Corp. v. Beaver County, Pa.*, 328 U. S. 204 (1946).

STATUTES INVOLVED.

The statutory provisions involved are the Miller-Tydings Amendment to the Sherman Act of July 2, 1890, 15 U. S. C. Sec. 1, 50 Stat. 693; the McGuire Act of 1952, 15 U. S. C. Sec. 45(a)(1)-(5), 66 Stat. 632; the Ohio Fair Trade Act of 1959, Ohio Revised Code Secs. 1333.27 through 1333.34, 128 Ohio Laws 698. They are printed in Appendix B hereto.

QUESTIONS PRESENTED.

1. Whether the Ohio Fair Trade Act violates the Supremacy Clause of the Federal Constitution in that:

(a) The Act attempts to repeal Section 5(a)(5) of the McGuire Act and Section 1 of the Sherman Anti-Trust Act by authorizing the proprietor of a trademark or trade name to establish minimum resale prices for wholesalers with whom the proprietor is in competition;

(b) The Act attempts to repeal Section 5(a)(5) of the McGuire Act and Section 1 of the Sherman Anti-Trust Act by authorizing the proprietor of a trademark or trade name to compel its distributors to enter into "horizontal" (i..e at the same level of distribution), price fixing agreements or unlawful boycotting arrangements with other distributors;

(c) The Act attempts to repeal Sections 5 (a) (2), (3), (4) and (5) of the McGuire Act and Section 1 of the Sherman Anti-Trust Act by authorizing the proprietor of a trademark or trade name, who need not necessarily be the owner thereof, to establish minimum resale prices by notice to distributors without the consensual agreement intended by Congress.

2. Whether the Ohio Fair Trade Act is unconstitutional under the Due Process Clause of the Fourteenth Amendment to the Federal Constitution in that the Act confers upon the proprietor of a trademark or trade name a "proprietary interest" in a commodity despite the sale of and receipt of the full price for such commodity with the trademark or trade name affixed thereon, and by reason of such "proprietary interest," empowers the proprietor to compel a remote non-consenting vendee to adhere to a minimum resale price.

3. Whether the federally unconstitutional provisions of the Ohio Fair Trade Act are so commingled and entwined with the remainder of the Act and so inseparable therefrom as to make the entire Act unconstitutional under the Federal Constitution.

STATEMENT OF THE CASE.

On January 22, 1958 the Supreme Court of Ohio nullified the non-signer clause of the Ohio Fair Trade Act of 1936 (O. R. C. Sec. 1333.07) as constituting a deprivation of property without due process of law and permitting the delegation of legislative power to private persons, in contravention of the Ohio Constitution. *Union Carbide & Carbon Corp. v. Bargain Fair, Inc.*, 167 Ohio St. 182, 147 N. E. 2d 481.

Following this decision retailers in Ohio, who had not signed fair trade contracts, were free to set retail prices on trademarked and trade name merchandise in conformity with their own pricing structure.

In the summer of 1958 Hudson opened its store in downtown Cleveland, Ohio, where it sold brand name drug merchandise including merchandise manufactured by Lilly at prices below fair trade prices. Hudson has never used brand name merchandise as "bait" or as "loss leaders."

In June of 1959, the legislature of Ohio passed a new fair trade act, to take effect on October 22, 1959. (Appendix B, p. 87.) The new legislation was intended to override the decision of the Supreme Court in the *Bargain Fair* case. See opinion in this case in the Court of Appeals for Cuyahoga County, Appendix A, at p. 39.

Prior to the effective date of the statute, Lilly sent letters to Hudson stating that Lilly had established fair trade prices for its products and that such prices would be enforced when the statute became effective. On the ef-

fective date, Hudson filed suit in the Court of Common Pleas of Cuyahoga County, Ohio, against Lilly for a declaratory judgment to test the constitutionality of the Fair Trade Act of 1959. Lilly filed a cross-petition for injunctive relief, accounting and costs.

In its petition, Hudson attacked the Act as repugnant to various provisions of the Ohio Constitution, and as violative of the Supremacy clause and the Due Process clause of the Fourteenth Amendment to the Federal Constitution. These respective federal and state grounds were briefed, argued and pressed by Hudson in the trial court and in the appellate courts. Hudson's standing to challenge the constitutionality of the Act has never been questioned.

It is undisputed that Hudson purchases no merchandise from Lilly and that all of its requirements are purchased from a wholesaler in Michigan. Lilly has conceded that, apart from the fiat of the "Fair Trade" law, there was no consensual agreement with Hudson for the maintenance of resale prices.

Lilly does not sell directly to retailers. It sells only through wholesalers who in turn resell to retailers. Lilly has established fair trade prices in Ohio at the retail level by entering into written fair trade contracts with retailers and by serving notice of the establishment of such prices upon non-signing retailers.

The Lilly fair trade contracts compel its retailers to boycott those dealers who sell below fair trade prices. Paragraph 6 of the contract provides:

> "6. Retailer agrees not to knowingly sell any of manufacturer's 'Identified Commodities' to any dealer who fails to observe the minimum retail, resale prices established under paragraph 3 hereof."

Hudson brought similar suit against the Upjohn Company ("Upjohn") which had given notice of the establishment of fair trade prices. A cross-petition for relief under the statute was filed in this case.

It was stipulated between Hudson on the one hand, and Lilly and Upjohn on the other, that the cases would go forward on the limited question of constitutionality raised in the Hudson petitions.

The Upjohn and Lilly cases were tried by the Court of Common Pleas of Cuyahoga County in the summer of 1960. On July 28, 1960, the trial judge, after reviewing the entire Fair Trade Act, held the Act to be repugnant to the Ohio Constitution under the *Bargain Fair* decision for the reason that "Regardless of any other changes in the Act, this delegation of legislative authority remains." (Appendix A, p. 37.) The trial court found it unnecessary to pass upon the federal questions.

Upjohn and Lilly appealed to the Court of Appeals for Cuyahoga County, which, by a vote of two judges to one, reversed the Court of Common Pleas on July 13, 1961 and upheld the constitutionality of the statute. In its opinion the Court of Appeals only considered the state constitutional issues. However, the first paragraph of its journal entry states that:

> "1. Sections 1333.27 through 1333.34 of the Ohio Revised Code are valid, lawful and enforceable enactments of the Ohio General Assembly and are neither in violation of the Constitution of the State of Ohio, *nor in violation of the Constitution af the United States*." (Appendix A, p. 71.)

Hudson appealed to the Ohio Supreme Court. The Upjohn and Lilly cases were argued together before the court which issued its joint opinion on May 8, 1963, reported in 174 Ohio St. 487. The judgment of the Court of

Appeals was affirmed by a minority of three justices who confined their opinion to the state constitutional issues and held that the infirmities of the non-signer clause nullified in *Bargain Fair* were remedied by the new statute. In summary the Court said: "None of the constitutional attacks on this new Act have merit." (Appendix A, p. 85.)

Inferentially the Ohio Supreme Court sustained constitutionality on federal grounds.

In other Ohio counties final judgments have been entered holding the entire Fair Trade Act to be unconstitutional. See *Helena Rubinstein v. Cinci Vitamin & Cosmetic Distributors, Inc.*, 84 Ohio L. Abs. 143, 167 N. E. 2d 687 (Common Pleas, Hamilton County [Cincinnati], 1960) and *Bulova Watch Co., Inc. v. Ontario Stores of Columbus, Inc.*, 86 Ohio L. Abs., 585, 176 N. E. 2d 527 (Common Pleas, Franklin County [Columbus], 1961) affirmed without opinion by the Court of Appeals for Franklin County, June 19, 1962. That same day, on the ground of the unconstitutionality of the statute, the Franklin County Court of Appeals in nine separate cases, affirmed judgments of the Court of Common Pleas below which had sustained demurrers to and dismissed fair trade petitions filed by various drug and cosmetic manufacturers. *Mead Johnson & Co. v. Columbus Vitamin & Cosmetic Distributors, Inc.*, 1962 C. C. H. Trade Cases, Par. 70,360.

In the *Bulova Watch* case, the Court of Common Pleas of Franklin County held the statute to be repugnant to the Miller-Tydings Act and the McGuire Act, hence unconstitutional under the Supremacy Clause of the United States Constitution and the Court of Appeals for Franklin County affirmed. Both the *Helena Rubinstein* and *Bulova Watch* decisions remain in full force and effect in the second and third most populous counties of Ohio.

THE QUESTIONS ARE SUBSTANTIAL.

This case brings before the Court an attempt by the Legislature of Ohio to repeal a substantial segment of the Federal antitrust laws. If more states enact like legislation, any need for congressional action to enlarge the McGuire Act will largely disappear, for the states will accomplish that which the Congress had thus far declined to do. The Ohio Fair Trade Act of 1959 (*Ohio Revised Code* Sections 1333.27 through 1333.34, 128 Ohio Laws 698), under the guise of authorizing fair trade contracts by "notice," openly invites unlawful horizontal price fixing agreements at every level of distribution in direct contravention of the Miller-Tydings Act and the McGuire Act.

1. It has long been held that the exemptions provided by the Miller-Tydings Act and the McGuire Act, are in derogation of the antitrust laws and must be strictly construed. *Ethyl Corporation v. United States*, 309 U. S. 436 (1940); *United States v. Univis*, 316 U. S. 241 (1942); *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U. S. 384 (1951). In the case of *United States v. McKesson & Robbins*, 351 U. S. 305 (1956) this Court stated at p. 316:

> "Congress has marked the limitation beyond which price fixing cannot go. We are not only bound by these limitations but we are bound to construe them strictly, since resale price maintenance is a privilege restrictive of a free economy."

Both of these exempting statutes expressly forbid horizontal price fixing agreements, arrangements and combinations.[1]

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[1] The Miller-Tydings Act provides in part:

"that the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein

(*Continued on following page*)

This Court has expressly held in *United States v. McKesson & Robbins*, 351 U. S. 305 (1956) that fair trade contracts between a manufacturer, who acts as a wholesaler, and its independent competing wholesalers are void under the antitrust laws. The doctrine of *McKesson & Robbins* was extended to prohibit fair trade contracts between a manufacturer who maintains retail outlets and independent retailers of his products. *Esso Standard Oil Company v. Secatore's Inc.*, 246 F. 2d 17 (1st Cir., 1957). The concurring opinion of Judge Aldrich in the *Secatore's* case expressed the view that actual competition is not necessary to nullify such contracts. By the same token, nonsigners of such contracts are without obligation to honor fair trade prices.

The Legislature of Ohio, in passing the Fair Trade Act of 1959, gave no consideration whatever to the strict limitations of the antitrust law exemptions provided by the Miller-Tydings Act and the McGuire Act. It enacted a statute which expressly permits horizontal price fixing in Ohio, the Federal antitrust laws as construed by this Court notwithstanding.

Horizontal price fixing is expressly authorized at the

(*Continued from preceding page*)

involved, *between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other.*" (Emphasis supplied.)

This prohibition is reaffirmed by the McGuire Act Section 5(a)(5), which states:

"Nothing contained in paragraph (2) of this subsection shall make lawful contracts or agreements providing for the establishment or maintenance of minimum or stipulated resale prices of any commodity referred to in paragraph (2) of this subsection, *between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other.*" (Emphasis supplied.)

wholesale level by Ohio Revised Code Section 1333.29 (A), which provides in part:

> "A proprietor may so establish such minimum resale prices for his wholesale distributors, notwithstanding section 1333.34 of the Revised Code, *even though he sells such commodity to retailers in competition with such wholesale distributors*, if such sales to retailers are made at prices not less than those he establishes for such wholesale distributors for comparable sales." (Emphasis supplied.)

This provision is apparently designed to suit the convenience of many integrated manufacturers who sell directly to retailers, while at the same time selling to wholesalers with whom they compete for the retailer's business.[2]

In an apparent effort to stop the "diverting" of fair-traded merchandise to cut-rate outlets, the legislature enacted further provisions granting carte blanche to horizontal price fixing at *every* level of distribution. The statute defines a distributor as "Any person who acquires commodities for the purpose of resale." Revised Code Section 1333.28 (E). It is axiomatic that this definition encompasses businessmen at the same functional level of distribution, including those in actual competition with one another.

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[2] In an article entitled "Fair Trade, Alias 'Quality Stabilization': Status, Problems and Prospects" by Professor Glen E. Weston appearing in 22 *A.B.A. Antitrust Section* 76 (1963) at pages 93-94 Professor Weston analyzes proposed New York legislation which is virtually identical with O. R. C. Sec. 1333.29 (A):

> "One particularly questionable feature of the bill would permit a manufacturer-wholesaler to make Fair Trade agreements with its own competing wholesalers so long as the manufacturer-wholesaler does not cut prices and does not wholesale products of other brand owners. This appears to be based on a narrow reading of the *McKesson* rule, limiting it to facts existing in that case but which were not regarded as significant by the Supreme Court. This provision would seem to be of doubtful validity because it probably conflicts with the Supreme Court's interpretation of the McGuire Act."

Under the aegis of Revised Code Section 1333.29(B) (2), a proprietor can agree with a distributor of his product that such distributor

> "will require from any distributor to whom he may resell such commodity an agreement that such distributor will not, in turn, resell such commodity at less than the minimum resale price stipulated by the proprietor thereof for the level of distribution at which such distributor resells *and that such distributor, if he resells to another distributor, will make the same agreement with the distributor to whom he may resell;*"

Ohio Revised Code Section 1333.29(B)(3) permits the proprietor to make a like promise to the distributor that the *proprietor*

> "* * * will require from any other distributor to whom he may sell other items of such commodity an agreement that such distributor *will not, in turn, resell such commodity at less than the minimum resale price stipulated by the proprietor for the level of distribution at which such distributor resells and that such distributor, if he resells to another distributor, will make the same agreement with the distributor to whom he may resell.*"

By the mechanisms provided in these statutory sections, a proprietor can deputize and compel every person in his distribution system to assist in the enforcement of fair trade prices, both inside and outside of Ohio. The stream of interstate and intrastate commerce at wholesale and retail levels is effectively dammed up unless resale is effected within lines demarcated by the proprietor, i.e.:

(a) resale by the initial vendee at the fair trade price for his particular level of distribution; and

(b) resale to subsequent vendees who observe fair trade at their respective levels of distribution.

Upon a proprietor's invoking the statutory scheme, a wholesaler may not sell the trademarked goods to

another wholesaler, nor may a retailer sell to another retailer except on pain of first exacting an agreement as to the price at which the respective vendee will resell. This is indeed the very evil prohibited by the federal enabling legislation. The unlawful clogging of the flow of interstate commerce would appear to be self-evident, cf. *United States v. Utah Pharmaceutical Assn.*, 201 F. Supp. 29 (1962), *affirmed without opinion*, 371 U. S. 949.

It would seem crystal clear that the Ohio Legislature has misconceived its function in the federal scheme of things.

The Lilly fair trade contract, in reliance on the shield provided by these sections, compels its retailers in Ohio to boycott price cutters as a vital link in the Lilly fair trade enforcement chain. Paragraph 6 of the contract provides:

> "6. Retailer agrees not to knowingly sell any of Manufacturer's 'Identified Commodities' to any dealer who fails to observe the minimum retail, resale prices established under paragraph three hereof."

These provisions are patently unlawful under the antitrust laws. *United States v. Parke-Davis & Company*, 365 U. S. 29 (1960).

The Ohio Legislature has no power to enlarge the scope of the Miller-Tydings Act and the McGuire Act in order to permit horizontal price fixing both inside and outside the State of Ohio. Power to amend the antitrust laws is vested solely with the Congress. In the face of a growing number of state Supreme Court decisions nullifying state fair trade laws, bills have been introduced with regularity in Congress to enact national fair trade legislation. In the more recent sessions of Congress, these have been designated as "Quality Stabilization" bills. Each of these bills has provisions amending the antitrust laws to permit horizontal price fixing.

On September 12, 1962, the House Committee on Interstate and Foreign Commerce reported on H. J. Res.

636 in Report No. 2352. Section 14 of this bill expressly sanctions horizontal price fixing by providing:

> "(14) All such rights and remedies provided in paragraphs (7) to (14), inclusive, shall be *also available to any owner of a brand, name, or trademark who, in the sale of goods identified by such brand, name, or trademark shall compete, at any level of distribution, with any reseller offering such goods*: Provided, That such owner shall sell such identified goods at any level of distribution only at the price or within the price range currently established by such owner for that level of distribution." (Emphasis supplied.)

The House committee was not at all hesitant in explaining the purpose of paragraph 14. The report on H. J. Res. 636 states at page 15:

> "* * * *This is intended to overrule the so-called McKesson & Robbins doctrine* (see 351 U. S. 305), *in that the right of a brandname owner to establish prices shall not be denied in cases where the owner engages in multiple distribution, even if he sells in competition with his reseller customers.* Such would be the case if a brandname owner, manufacturing a trademarked commodity, also operated retail stores, at the same time selling to wholesalers and retailers." (Emphasis supplied.)

Before the Ohio General Assembly can constitutionally move to legalize horizontal price fixing, it must first await appropriate enabling legislation by the Congress. In its zeal to overcome the *Union Carbide and Carbon Corp. v. Bargain Fair, Inc.* decision, *supra*, the Ohio legislature acted precipitously and wholly beyond the bounds of Federal sanction. Almost four years have elapsed since the passage of the Fair Trade Act of 1959 and the Congress has still seen fit to retain the Miller-Tydings Act and the McGuire Act in their original form.

Upjohn has availed itself of the horizontal price-fixing provisions of the Ohio Act by entering into agreements with wholesalers of its products with whom it competes and by fixing wholesale resale prices to retailers. Upjohn calls these agreements "del credere agency" contracts. However, according to the branch sales manager of its Cleveland District, Upjohn regards wholesale pricing catalogues furnished to such wholesalers as fair trade wholesale schedules. The titles given to these agreements with wholesalers cannot mitigate their true nature as horizontal price-fixing agreements among competing wholesalers and manufacturers in violation of the Sherman Act. *United States v. Masonite Corp.*, 316 U. S. 265 (1942).

2. The Miller-Tydings Act and McGuire Act exempted from the antitrust laws *contracts* or *agreements* which meet specific standards provided therein. In addition, the McGuire Act in section 5(a)(3) sanctions rights of action created by any state in favor of trademark or trade name owners against any person offering or selling commodities at prices less than those prescribed by fair trade *contracts* or *agreements*, whether or not the offending person is a party to any such *contract* or *agreement*. When Congress enacted these laws, it intended that as a prerequisite to enforcement against nonsigners, there first be in existence *contracts* or *agreements* voluntarily entered into establishing fair trade prices.

This Court in *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U. S. 384 at 388, explained what these words mean as they appear in the Miller-Tydings Act:

> "*The Act sanctions only 'contracts or agreements.' If a distributor and one or more retailers want to agree, combine or conspire to fix a minimum price, they can do so if state law permits.* Their contract, combination or conspiracy—hitherto illegal—is made lawful.

"They can fix minimum prices pursuant to their contract or agreement with impunity. *When they seek, however, to impose price-fixing on persons who have not contracted or agreed to the scheme, the situation is vastly different.* That is not following the path of consensual agreement; *that is resort to coercion.*" (Emphasis supplied.)

The Miller-Tydings requirement of fair trade "contracts or agreements" was reenacted without change in the McGuire Act where the statutory phrase is reiterated at least seven times.

Notwithstanding the clear intention of Congress, the Legislature of Ohio decided to devise its own criteria for contracts or agreements. Permeating the Fair Trade Act of 1959 is a dogma that contracts to abide by fair trade prices no longer require the consent of the respective parties.

In the decision below, the Ohio Supreme Court at 174 Ohio St. 488 recognized that without the "contract by notice" provision, the Fair Trade Act of 1959 is meaningless.

> "*The heart of the new act, the implied contract doctrine, is spelled out in Section 1333.28(1), Revised Code.* 'Contract' is defined therein as 'any agreement, written or verbal, or arising from the acts of the parties.' That section provides further that a person who acquired a commodity 'directly from the proprietor or otherwise' after actual notice that the proprietor has established a minimum resale price is bound to observe that price; and that such a person by accepting the commodity 'shall thereby have entered into an agreement with such proprietor not to resell such commodity at less than the minimum price stipulated therefor by such proprietor.' "

Under the provision of Revised Code Section 1333.29 (A), mere notice is sufficient. That this conception is totally inimical to and incompatible with the express word-

ing of the Federal antitrust laws has been recognized by the courts of Franklin County, Ohio in the case of *Bulova Watch Co., Inc. v. Ontario Stores of Columbus, Inc.*, 86 Ohio L. Abs. 585, 176 N. E. 2d 527 (1961), affirmed without opinion by the Court of Appeals for Franklin County on June 19, 1962.[3]

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[3] At 86 Ohio L. Abs. 598-599, the court observed:

"One other aspect of this case should be mentioned. As mentioned before, the Miller-Tydings Act exempted from the Sherman Act only 'contracts and agreements' prescribing minimum resale prices. It is clear, we believe, from the Opinion of the Court in the *Schwegmann* case that this Act authorized *only* contracts in the sense of truly consensual agreements without resort to coercion or compulsion, including state legislative compulsion. *In other words, we think it clear that, at least in the absence of the McGuire Act, actions taken under the 1959 Ohio Act to establish minimum resale prices would be in violation of the Sherman Act,* for the reason that a legislatively established 'agreement,' absent true common law 'mutual assent' or 'meeting of the minds,' would not come within the purview of the words 'contracts or agreements' as contained in the *Miller-Tydings Act.* See also *Johnson & Johnson v. Charmley Drug Co., supra.*

"The McGuire Act, Title 15, Sec. 45, P. (2d), U. S. C., also refers to 'contracts or agreements' and must be given the same meaning. Then in Par. (3) it makes lawful the enforcement of any right created by state law which, in substance, provides that wilfully and knowingly selling at less than the price 'prescribed in *such contracts or agreements*' is actionable 'whether the person so * * * selling is or is not a party to *such a contract* or *agreement!' We think it clear that the words 'contract or agreement' as employed in Par. (3) as well as Par. (2) of the McGuire Act, have the same meaning as these same words employed in the Miller-Tydings Act, as construed by the Schwegmann case.*

"This situation has given rise to the proposed Harris Act, (H. R. 1253), which would amend the McGuire Act to permit the establishing of minimum resale prices by notice.

"Thus it would appear that the provision of the 1959 Ohio Act requiring *no* 'contracts or agreements' within the purview of the Miller-Tydings Act or the McGuire Act, *would not fall within the scope of such acts and any minimum resale prices established without such 'contracts or agreements' would be in violation of the Sherman Act."* (Emphasis added.)

The statute as interpreted by the court below makes short shrift of the consensual basis for fair trade "contracts or agreements" intended by Congress. The "contract by notice" provisions of the Ohio Act have as much suggestion of consent as a military command.

Under Revised Code Section 1333.30, this notice, which of itself constitutes a contract, may be imparted by mail, through advertising, by means of attaching prices to the merchandise, or even orally.

Revised Code Section 1333.28(I) provides that a distributor who accepts merchandise with notice that fair trade prices have been established

> *"shall thereby enter into an agreement with such proprietor not to resell such commodity at less than the minimum price stipulated therefore by such proprietor."*

whether or not he deals directly with the manufacturer.

Hudson has done everything within its power to reject any fair trade contracts with Lilly. It purchased no merchandise from this company and had no direct dealings with it. By the institution of the within declaratory judgment litigation, Hudson could hardly have manifested its intentions more clearly. Nevertheless, Lilly has sued Hudson for the enforcement of fair trade prices contending that Lilly and Hudson have entered into fair trade contracts as defined by the Ohio statute.

The Congress has recognized that the Miller-Tydings Act and the McGuire Act forbid contracts by *notice*. In 1959, prior to the effective date of the Ohio Fair Trade Act, the "Harris Bill" and like legislation to establish a national fair trade program were before the House Committee on Interstate and Foreign Commerce. The Harris Bill (H. R. 1253) would amend the McGuire Act to au-

thorize state legislation permitting the establishment of minimum resale prices by *notice* in addition to the presently authorized means, to wit, by contracts or agreements. The Committee report on H. R. 1253, H. R. Rep. No. 467, dated June 9, 1959, specifically recognized that as of that time notices had no efficacy in establishing fair trade prices. At page 18 of the Report appears the following explanation of a section of the Bill which would permit the establishment of fair trade prices by *notice*:

> "The only change proposed in paragraphs (2), (3) and (4) is to add a reference to 'notices' in the provisions referring to contracts and agreements. *This change is made so that where a State law permits a manufacturer to establish a stipulated or minimum resale price by the giving of notice, the McGuire Act provisions will apply to the same extent that they now do in the case of State laws which permit the establishment of such prices by contracts or agreements between manufacturers and their distributors.* The committee has been informed that Virginia has modified its Fair Trade Act so as to permit the establishment of stipulated or minimum prices by notice." (Emphasis supplied.)

The Harris Bill never came to a vote. The requirement of the Miller-Tydings Act and the McGuire Act that there be contracts or agreements based upon actual consent remains unchanged.[4]

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[4] In his article appearing in 22 *A. B. A. Antitrust Section* 76 *supra* at pages 92-93, Professor Weston concurs in appellant's belief that the notice provisions of the Ohio Fair Trade Act are outside the exemption of the McGuire Act:

> "There is some doubt whether the Virginia-Ohio type of statute is within the exemption granted by the McGuire Act. The McGuire Act grants its exemption only for 'contracts or agreements' or enforcement of rights of action permitted by state law for selling below prices prescribed in 'such con-

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3. In seeking to create justification for the extensive and unlawful marketing powers retained by the "proprietor," the Ohio Fair Trade Act also resorts to a legal "sleight-of-hand" by way of justification of vertical and horizontal price-fixing. The Act borrows the "property" language of the trade-mark cases preventing interference with the legitimate functions of trade-marks. The Act confers upon the "proprietor" of a trade-mark or trade name a "proprietary interest" in commodities bearing such an identification so long as the commodities retain the markings. Revised Code, Section 1333.31. By reason of this "proprietary interest" the proprietor, who may be a third person designated by the owner of the trade-mark, can compel a remote nonconsenting vendee to adhere to a minimum resale price despite the vendor's sale and receipt of the full purchase price for such commodity.

Having the authority to fix retail prices by notice, the proprietor has the power to take away from the retailer or wholesaler his basic constitutional business freedoms—to buy and resell any products, including Upjohn's in the regular course of commerce; to resell them at the price which he chooses in or out of Ohio; and to conduct his daily

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tracts or agreements.' The Virginia statute provides for 'notice' of the resale price which becomes a 'contract' upon acceptance of the goods with notice. The Ohio statute specifically states that it is lawful for a trademark proprietor to 'establish and control by notice to distributors or by contract' stipulated minimum prices. The Ohio statute would be even more questionable as apparently construed by a minority of its Supreme Court as creating a proprietary interest in the trademark owner in goods that are purchased in another state. Under the doctrine of strict construction of the McGuire Act there is room for argument as to whether these statutes exceed the limited scope of the exemption. For these reasons, H. R. 1253 in the 86th Congress sought to amend the McGuire Act to make it clear that the Virginia and Ohio laws were within the exemption."

business affairs free from the extensive pricing and marketing restraints sought to be imposed by the statute.

The Department of Justice has clearly stated its opinion that the proprietary interest provision of the Quality Stabilization Bill of 1962 (H. J. Res. 636)

> "* * * destroys common law property concepts by enabling a person to sell his property and still maintain significant control over it."

Transcript of Hearings on the Quality Stabilization Bill before a Subcommittee of the House of Representatives Committee on Interstate and Foreign Commerce, 87th Congress, 2nd Session p. 337; testimony of Lee Loevinger, Assistant Attorney General, Antitrust Division, Department of Justice.

The Federal Trade Commission, in commenting upon the proposed Harris Bill of 1959 (H. R. 1253), expressed considerable alarm at a section of the bill closely akin to the "proprietary interest" clauses of the Ohio statute. In its report to the House Committee on Interstate and Foreign Commerce, the Commission stated:

> "The price control permitted to a proprietor by H. R.'s 768 and 1253 would not depend upon any agreement between the proprietor and a distributor, but could be accomplished by unilateral decision and notice by the proprietor. H. R. 1253 would go further by explicitly permitting any manufacturer of branded merchandise to delegate to another person 'the sole authority to establish within the United States stipulated or minimum resale prices' for the manufacturer's merchandise. *This bill would constitute significantly more radical departure from our traditional notions of a free market than any of the previous resale price maintenance exceptions to the antitrust laws contained in the Miller-Tydings or Mc-*

Guire Acts." Report No. 467 to accompany H. R. 1253, pp. 28-29. (Emphasis supplied.)

Concern was also voiced by the Department of Commerce, which made the following observation in its letter to the House Committee on the Harris Bill:

> "Further, it would specifically establish a retention of a proprietary interest by the manufacturer after outright sale of his goods and during a succession of changes of ownership at all levels of trade. *In our opinion this would be a dangerous precedent, contrary to current concepts of property rights.*" Report No. 467 to accompany H. R. 1253, p. 26. (Emphasis supplied.)

The attempt in the Fair Trade Act of 1959 to retain in the proprietor power to determine prices for merchandise after its sale to retailers, possibly through the hands of several middlemen, creates an erroneous inference that somehow sale of the commodity has been incomplete; that a trade-mark is in the nature of a covenant running with the land.

The Fair Trade Act of 1959, within its framework of "contracts by notice" and "proprietary interest" effectively deprives Hudson and other retailers of their basic property rights without due process of law and without just compensation in contravention of the 14th Amendment to the United States Constitution.[5]

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[5] This was the express holding of Judge Leach in *Bulova Watch Co., Inc. v. Ontario Stores of Columbus, Inc.* 86 Ohio L. Abs. 585 at 598:

> "We have not overlooked the contentions of counsel, including the assertion that the 1959 Act has either created or recognized a property right in the commodity *itself* after he has sold it to distributors, so long as the trade-mark or trade name remains thereon. Sec. 1333.31 R. C. *Standing alone, we would doubt the authority of the General Assembly to so create a property right.* But this provision does not stand alone. It is but part of a legislative scheme designed as to

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4. On October 9, 1961, this Court dismissed an appeal in the case of *The Standard Drug Co., Inc., v. General Electric Co.*, 202 Va. 367, 117 S. E. 2d 289, appeal dis-

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its end result to compel persons to abide by minimum resale prices established by private persons, not to create property rights as such. In effect, it is but a legislative statement of a reason why it felt it had the power to regulate by such means. In *Union Carbide this same reason was urged upon the Court and rejected.*" (Emphasis supplied.)

The Wyoming Supreme Court held likewise in *Bulova Watch Co. v. Zale Jewelry Co. of Cheyenne*, 1962 C. C. H. Trade Cases, Par. 70,317 at pages 76,277 to 76,278:

"It would seem to be an unjustifiable, untenable and somewhat absurd legal fiction to say that by simply inscribing his trade-mark upon, attaching it to, or accompanying it with an article a producer obtains or retains a divisible and separate title to the trade-mark which does not pass with the marketing and delivery of the commodity itself to the buyer. When a producer elects to identify his product with a trademark and launches it into the marts of trade, he has created and sold an entity—a unit—an integrated article—which its purchaser is not required to destroy or deface in order to lawfully market it at a price suitable to him, provided only that he has not offended antidiscrimination laws. If the producer does not want to sell the product bearing his trademark, it is his privilege to refrain from so doing. And when he does so identify his product, he is privileged to determine the price which he is willing to accept for it as a trademarked commodity. He may fix one price for the article with his trade-mark and accept a different price for an identical article not bearing his trade-mark. In either case he sells that which he wants to sell and obtains the price he asks for what he sells. *However, the commodity he sells embodies the entire article, including whatever he has added to it, or placed upon it, or which accompanies it.* He has been paid the full price demanded by him. When such a sale is made, the seller gives into the buyer's possession everything which he has placed upon or with the object of sale. He retains no part of it. If there is any merit at all in the theory of continuing separate identity and ownership of the trademark as distinguished from the article itself, a simple answer is that *by affixing to or accompanying with the object of sale the owner's trade-mark, and placing the commodity thus identified upon the market, the producer or distributor has offered and sold all his interest in that portion of his trademark which he placed in use upon or with the article sold*, and in so doing has consented to its continued use by all purchasers." (Italics supplied.)

missed 368 U. S. 4. The *Standard Drug* case involved the Virginia Fair Trade Act of 1958.

The Virginia statute is materially different from the Ohio Act, and omits the provisions of the Ohio law which give rise to the substantial Constitutional issues under the Supremacy clause and Due Process clause.

(a) Subsequent to the decision of the *Standard Drug* case, the case of *Bulova Watch Co. v. Zale-Norfolk, Inc. Jewelers Co.,* File No. 2570 was decided in the Court of Law and Chancery, City of Norfolk, Virginia on August 18, 1961. This case held that the "Notice of Minimum Resale Price" provision of the Virginia statute is binding only upon a merchant who, with notice of the price, buys *directly* from the fair-trader.

Where a trade-marked commodity is purchased *directly* from the fair-trading vendor, consent by the purchaser to adhere to the minimum resale price can be reasonably inferred.

In Ohio the notice is binding upon *any purchaser,* direct or remote, of the trademarked goods, and consent to the fair trade price or the lack thereof is entirely immaterial.

(b) The Virginia statute does not contain the horizontal price fixing and restrictive marketing provisions which permeate the Ohio statute.

(c) Nothing in the Virginia statute resembles the provisions of the Ohio Act which create a "proprietary interest" in the trademark owner sufficient to empower him to dictate unilaterally resale prices through the various levels of distribution.

The decision by the Ohio Supreme Court below would create in the proprietor, rights which are far greater than

those now enjoyed by the holder of a patent. In *Sunbeam Corporation v. Wentling*, 192 F. 2d 7 (3rd Cir., 1951), at page 9 the Court stated:

> "A patentee is given a monopoly by legal grant. But even a patentee, who can exclude everyone else from making his patented article, cannot control the price at which others may sell his articles to consumers. The protection given to the owner of a trademark certainly should not be greater than that given to the holder of a legal monopoly, the patentee."

In *United States v. Univis Lens Co.*, 316 U. S. 241, at 250 (1942) the Court held that a patentee could not control the alienability of his commodity after he had sold it. See also *Ethyl Gasoline Corp. v. United States*, 309 U. S. 436 (1940).

A fortiori an owner of a trade-mark cannot do what is forbidden to a patentee. *United States v. Bausch & Lomb Co.*, 321 U. S. 707 (1944).

The Lilly fair trade program in Ohio is built upon a dual foundation: on the one hand, a series of price lists are delivered to the retail trade which become "contracts by notice" with each "distributor" by statutory fiat, and on the other, separate forms of signed fair trade agreements with retailers. By statutory definition in the Ohio Fair Trade Act, both the express and "notice" forms of contracts have the same legal effect. Both draw their life blood from foundations of unlawful horizontal price fixing and illegal restrictive marketing practices. Such contracts, whether express or by notice, are wholly void and unenforcible by the express terms of Section 5 (a) (5) of the McGuire Act. By the express mandate of the McGuire Act they may not serve as the bases for action against Hudson.

Between 1949 and the date of the ruling of the Supreme Court of Ohio in the case at bar, the Supreme Courts of 23 states declined to give effect to their respective fair trade laws; four state Supreme Courts held such legislation to be wholly unconstitutional and nineteen rulings declined to give effect to the typical "nonsigner" provisions of state fair trade laws, in the form authorized by the federal enabling legislation, the McGuire Act.

In a last desperate effort to circumvent the trend of judicial decisions, the Ohio Legislature has resorted to a new and sweeping variation of fair trade legislation, which may be constitutionally enacted solely by the Congress. The parallels between the new Ohio legislation and the proposed "fair trade" or "quality stabilization" legislation of the last five years are too obvious for extended comment. The recognition by the Congress that it alone may enact the legislation promulgated by the Ohio Legislature, clearly reveals the violation by the Ohio Fair Trade Act of the Supremacy Clause of the Federal Constitution.

Unless this Court defines the limits beyond which state legislatures may not transgress in reenacting fair trade laws, it is highly probable that these legislatures will yield to the enormous pressure exerted by fair trade proponents and will follow the lead of Ohio. This would open the gates to a flood of new state legislation aimed at overturning major segments of the federal antitrust laws as interpreted by this Court in the *McKesson & Robbins* and *Schwegmann* cases.[6]

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[6] Legislation analogous to the Ohio Fair Trade Act was introduced to the New York Legislature in 1962. ("A Proposed New York State Fair Competitive Practices Act," Assembly Bill No. 704 and Senate Bill No. 1652.) The bill passed the Assembly but failed in the Senate. In the current term the Assembly failed to pass the bill.

CONCLUSION.

It is therefore respectfully urged that the questions raised by this appeal are substantial; that the federal issues involved are of great public concern; and that this Court should review the decision of the Supreme Court of Ohio in this case.

Respectfully submitted,

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APPENDIX A.

Opinion of the Court of Common Pleas for Cuyahoga County.

(Case Nos. 727,805 and 730,118.)

Decided July 28, 1960.

McNeill, Judge By Assignment [*In full text*]: These cases, although heard separately by the court, involve the same questions, and will be treated together. The plaintiff is seeking declaratory judgments questioning the constitutionality of the so-called Fair Trade Laws. Defendants, by cross petition, seek to enjoin plaintiff from selling their products at less than the fair trade price. In both cases, the evidence was submitted to the court upon stipulations and upon affidavits and counter-affidavits, it being agreed that such affidavits should be regarded as the testimony of the witnesses as if they were present. No question is raised that the parties are not all properly before the court, and that the court has jurisdiction over the subject matter. There is no dispute that plaintiff, after knowing the fair trade price imposed by defendants, sold the articles at retail for less than said price.

Originally it was held that price fixing under the Fair Trade Act violated the Sherman Anti-Trust Act. An amendment was made thereto granting exception in fair trade cases, and this was held unconstitutional as to non-signers. A further exception to the Sherman Anti-Trust Act was enacted which now permits states to adopt fair trade laws, if they are legal under State constitutions.

In Ohio, the Valentine Act, paralleling the Sherman Act, prohibits the setting of retail prices. The first Fair Trade Act provided an exception, and this was declared unconstitutional by the Supreme Court in the case of *Union Carbide v. Bargain Fair*, 167 O. S. 182 in January,

1958, because of its nonsigner provisions. Thereafter, in 1958, the legislature adopted the new act, R. C. § 1333.27, *et seq.*

The gist of the new act is that a producer or distributer of any article, or any person designated by either, if the article is trade-marked or given a trade name by either the producer or distributor, has a proprietary interest in the product so long as the commodity is identified by its trade-mark or trade name, and because of such proprietary interest, such producer, distributor or designee may designate a minimum sales price for such product. Anyone they contract with, or anyone else who buys with notice of these terms, even though not directly contracting with such party, as a matter of law is deemed to have agreed not to sell below the minimum sales price, and the remedies of the Act then apply. The minimum sale price may be maintained throughout the whole process of distribution until it reaches the consumer. One other new feature is the provision that if the seller has removed from such commodity all traces of the identifying trade-mark or name, he may then sell it at any price he desires.

This very theory of proprietary interest was argued before the Supreme Court and was discussed at length in their opinion in *Union Carbide, supra,* at page 184, and rejected by the court. Thus, the question arises, does this enactment by the legislature breathe constitutionality into the law that was previously rejected by the Supreme Court?

However, in 16 *C. J. S.* § 71, at page 26, is stated:

> "thus (legislature) may not by means of statutory enactment do indirectly that which it is prohibited from doing directly, by constitutional provison; nor can it do by implication that which it cannot do by express enactment. It is not, however, an illegal

evasion to accomplish a desired result, lawful in itself, by discovering a legal way to do it."

The court is not discussing the economic reasons for the enactment of the statute, so strongly urged in the affidavits, as the court will accept these facts as being true. The legislature, in R. C. § 1333.27 has set forth its reason and purpose, which includes the economic reasons and necessity for enacting the legislation. However, this Court, being a lower court, must necessarily examine the previous case of the Supreme Court, *Union Carbide, supra*, to determine whether any of those evils remain.

It is urged that in considering the constitutionality of the statute that the court must presume its constitutionality, unless it is clearly shown otherwise. However, that presumption does not always prevail.

> "The presumption does not apply, or its operation is given a narrower scope, where the statute shows on its face a violation of constitutional provisions; nor does it apply where such a presumption would defeat constitutional provisions. No presumption of constitutionality attaches to the action of a private group when its action is challenged by a person injuriously affected by it; similarly, when there is a delegation of the legislative power to a private individual who comes in conflict with another private individual of equal standing before the courts, the reason for indulging so strongly in the presumption of constitutionality of the statute involved ceases to exist." 16 C. J. S. § 99, page 408.

This appears to be the law of Ohio. *Belden v. Union Central Life Ins. Co.*, 24 O. O. 151; 143 O. S. 329.

In the *Union Carbide* case, *supra*, one of the grounds for the unconstitutionality of the old act, as stated by the Court, was:

"* * * and in addition, delegates legislative power and discretion to private persons."

There are many differences between the old act and the new act, but is there any material change in this respect?

Under the old act a manufacturer had the right to put a trade-mark on its goods if it desired. This right also ensued to the distributor. If they were trade-marked, they had the right to fair trade or not fair trade the articles. At this point, it would appear there was no undue delegation of authority, as our statutes are replete with instances where persons may decide either to place themselves within certain legislative actions, or not to do so; for example, the mechanic's lien laws. However, in such case, if a person does decide to take advantage of the mechanic's lien law, he then has no other choice, but the law falls and operates on him. This is not true in the fair trade cases, as, in addition to these choices, the producer or distributor has the choice of what price he will set, both for wholesalers and retailers, and after setting the price, he immediately has another choice of changing such fair trade price, or removing it; and even then he may fair trade and set his price again. In this respect, there is no difference between the old law and the present law.

In addition, the new law goes one step further in not only permitting a producer or a distributor from fixing the trade-mark and setting the price, but further provides that this right may be delegated. The new act does provide that a party may remove evidence of the trade-mark or name and then sell the article at any price he desires. This is mainly a paper right, as the proprietor can eliminate this right by making his mark on the merchandise in such a way that it cannot be removed. It may be, and often is, stamped in hard goods, and in many cases is moulded in

each individual pill. If this is done, the right disappears and this is at the option of the proprietor.

There is a long line of decisions in Ohio on delegation of legislative power. Some are helpful and some are not helpful. "Whenever the question is raised, the answer must be found in the language of the act; the attack without regard to extraneous facts." *Belden v. Central Life Insurance Company*, 143 O. S. 329 (Appeal dismissed: 323 U. S. 674).

Section 1, Article 2 of the State Constitution provides:

> "The legislative power of this state shall be vested in the General Assembly * * *."

It is clear the general assembly cannot delegate its legislative power, and any attempt to do so is unconstitutional. See: *Belden v. Insurance Co., supra*, and cases cited therein. In the same case, the Court stated:

> "On the other hand legislative acts granting to a board or an administrative agency quasi-legislative or quasi-judicial power, have been uniformly sustained where the General Assembly has laid down the policy and established the standards while leaving to an administrative agency the making of subordinate rules within prescribed limits and the determination of facts to which the legislative policy is to apply."

There is a much broader rule in reference to delegation of administrative agencies than there is to individuals, the reasons being necessity of government, and the presumption that a public official will properly exercise this power, he having no individual interest in the matter. This is not true with an individual. Defendants argue that Article VIII, Section 2 is the basis for the Act, but this in no way gives a right to delegate legislative power.

The argument is made that since the power to fix prices was available at common law, the Fair Trade Act

only restores this right; and therefore, cannot be a delegation of legislative power. With this argument, the court cannot agree. The act is not to nullify the Valentine Act, but to be an exception to it. The Fair Trade Act only has existence because Congress made such acts an exception to the Sherman Act. Its existence does not stem from a common law right, but it stems as a specific exemption to the Sherman Act, and only has life as it fits the exemption. The Fair Trade Act itself rebuts this argument. The legislature specifically granted a proprietary interest in a trade-mark or name, and gave this right to anyone holding this interest to set minimum prices. This right did not exist at common law to the holder or assignee or designee of a trade-mark or name. He may have the right to set prices generally at common law, but not because of his proprietary interest in his trade-mark. For common law rights of trade-marks generally, see: *U. S. v. Timken*, 83 F. Supp. 284 (at p. 315). This right granted to a holder of a trade-mark is greater than that possessed by the holder of a patent. *U. S. v. Masonite*, 62 S. Ct. R. 1070; 316 U. S. 265. This is a specific legislative enactment that gives a holder of a trade-mark or name a right he did not possess previously. This was clearly denoted in the *Union Carbide* case, *supra*.

The statutes construed by other states have held the right to set a minimum price without reference to any standard is a delegation of legislative power. *Remington Arms Co. v. Skaggs*, 345 P. 2d 1085 (Wash.); *Quality Oil v. E. I. DuPont DeNemours & Co.*, 322 P. 2d 731 (Kans.); *Bissell Carpet Sweeper Co. v. Shane*, 143 N. E. 2d 415 (Ind.); *Olin Mathieson Chemical Corp. v. Francis*, 301 P. 2d 139 (Colo.); *Dr. G. H. Tichenor A. Co. v. Schwegmann Bros.* 90 So. 2d 343 (La.); *General Electric Co. v.*

Wahle, 296 P. 2d 635 (Oregon); *McGraw Electric Co. v. Lewis & Smith Drug Co.*, 68 N. W. 2d 608 (Nebraska).

It is true that the Federal Government and some other states have held this not to be a delegation of legislative authority. The Federal decision is not controlling on the State courts as the Fair Trade Act, as an exception to the Sherman Act, depends upon its being constitutional in each state.

Early in Ohio a general distinction as to what may be delegated was set forth in *Cincinnati Railroad Co. v. Commissioners*, 1 O. S. 77. Grants without guides or standards were made to certain administrative officers. See: *Harmon v. State*, 66 O. S. 340; *Srigley v. Woodworth*, 33 O. A. 406. In *Opdyke v. S. & L. Co.*, 157 O. S. 121, at page 154, the Court stated:

> "In making that grant, the General Assembly has imposed conditions and limitations on the exercise of that power, such as the requirement of compliance with federal law and with regulations of the federal agency concerned with the question of whether a particular Ohio corporation should be permitted to become a federal savings and loan association. The imposition of such conditions and limitations on the exercise of the power so granted does not constitute a delegation of legislative power."

There are different standards in considering whether a delegation of power is proper. This depends on whether the delegation is to an individual or to a quasi government body. In *Weber v. Board of Health*, 148 O. S. 339, the Court, at page 396, stated:

> "Ordinarily, in delegating to boards and commissions the authority to make rules and regulations, the General Assembly must establish the legal policy by adopting standards and authorizing the boards and commissions to make their rules in accordance with

such standards. In the picturesque language of Justice Cardozo in his dissenting opinion in *Panama Refining Co. v. Ryan*, 293 U. S. 388, the power conferred must not be 'unconfined and vagrant' and must be 'canalized within banks that keep it from overflowing.' However, it is recognized that there are many occasions where the nature of the problem makes it impossible to lay down standards, and as a result *rule-making bodies* (Italics this Court's) must be allowed a wide discretion without anything as their guide except the general policy of the law-making body and the law that such bodies must not legislate or make rules which are unreasonable, discriminatory, or contrary to constitutional rights."

In this case, there are no guides or standards, no rules or regulations. The very persons who have the most personal interest in the products are granted the right to set its price. Not being quasi governmental bodies, the presumption that they will operate in the proper public interest does not exist. This certainly is "unconfined and vagrant" and may well overflow the banks.

In *Serrer v. The Cigarette Service Co.*, 148 O. S. 513, the court upheld the general right of the legislature to provide that cigarettes could not be sold below cost, but held the specific act unconstitutional because the formula therein provided did not take sufficient variations into consideration. At Page 522 therein, the Court stated:

> "Although in this day and age it can hardly be urged that legislative bodies in the exercise of the police power may not, in the public interest and in the promotion of economic stability, prohibit sales at below cost, the legislation enacted to accomplish such objects must be so phrased as to recognize economies and practices whereby one seller is able to sell particular merchandise at a lower price than a competitor and still not be chargeable with selling below actual cost.""

In this case, there is no formula whatsoever. Certainly if the Supreme Court has held that the legislature by failing to set up a proper formula in dealing with minimum prices acted illegally, a blanket grant of power to a private person to set minimum prices would be without effect.

A recent decision of the Supreme Court, *Remington Arms Co. v. G. E. M. of St. Louis, Inc.*, 102 N. W. 2d 525 touched upon this very problem. At Page 534 therein, the Court stated:

> "In examining the grant of authority to the trade-mark owner it must be conceded that he is given the privilege to place the law in effect and to amend or alter it at his will. He may do this without regard to the interest or welfare of nonsigners or the consumer who represents the public. The law does not provide for any standard or condition as to the necessity for the act. It gives to the trade-mark owner carte blanche authority to make that determination alone. He is not required to consult with anyone. There is no one to review his act."

The Court further states:

> "If we realistically appraise the act for what it is, it should be recognized as a selective price control act which leaves to the manufacturers of trade-mark products the arbitrary right to determine if and when it shall take effect. No standard or yardstick is provided by which such prices are to be determined. It grants to a private party the privilege of creating a right of action for its own benefit or suspending that right at its will. No hearing is provided for to safeguard or protect the unwilling retailer or the consumer. Thus, by virtue of the nonsigner clause the private party in effect may regulate prices as it sees fit. Since one manufacturer and one retailer may fix prices for all retailers, they have the complete power

to fix prices regardless of anyone's interest but their own. * * *"

In the act therein in question, the proprietor of the trade-mark had to enter into a contract with one other person. Under the Ohio Statute, he need contract specifically with no one, only give notice of what price he chooses and then by operation of law, this becomes a part of every contract of sale.

One other question may be raised in reference to delegation of power, which the court is not deciding. The Supreme Court of Oregon, in the case of *General Electric v. Wahle, supra,* held that there is a question whether the legislature itself could set individual fair trade prices for all articles in commerce and place specific prices on each article. The Court held:

> "If the legislature does not have the authority, it certainly cannot give it to anyone else."

No effort is made here to protect the consumer and indirectly the retailer by providing that certain services must be provided; that service personnel must be provided in proportion to the volume of business, as is done with the sellers of new cars or the use of other devices. The problem is very real and needs some solution. However, Fair Trade in Ohio does not appear to be the answer. The Supreme Court, in *Union Carbide, supra,* at Page 186, in giving its reasons for the original acts invalidity stated:

> "* * * in addition, delegates legislative power and discretion to private persons.* * *"

Regardless of any other changes in the act, this delegation of legislative authority remains. This being a lower court, it is bound to follow the dictates of the Supreme Court, and this court does understand this to be its decision.

The court deciding this issue as it has, other questions concerning the act raised in the briefs are not discussed.

Journal Entries prepared and filed this date in accordance herewith.

Judgment of the Court of Common Pleas of Cuyahoga County.

(Dated July 28, 1960.)

(Like Orders filed July 28, 1960, Nos. 727,805 and 730,118.)

This cause came on to be heard upon the pleadings, the evidence, the oral argument of counsel, and upon the briefs submitted by counsel of record and amicus curiae.

The Court finds that it has jurisdiction of the parties hereto, of the subject matter of the action, and that all things have properly been done to bring the subject and all parties before the court.

The Court finds that there has been an enactment in the State of Ohio of R. C. 1333.27-1333.34, inclusive entitled "Fair Trade and Minimum Resale Prices" effective October 22, 1959, and that said act permits a producer or distributor trade-marking or trade-naming an article for retail sale which is in free and open competition with the same general class produced by others and offered for sale in the same general market area, or their designees, to control by notice to distributors, or by contract stipulated minimum resale prices for such commodities; that no standards or limitation of any type is provided to control the discretion of said person setting said price, and that therefore, said act is in violation of Section 1, Article II of the Constitution of the State of Ohio;

That said provisions are an integral and unseparable part of said act and because thereof, R. C. 1333.27-1333.34,

inclusive, are in violation of the Constitution of the State of Ohio, and are of no force and effect; that plaintiff's rights in the sale of its property are affected thereby; and that there is a controversy and judiciable issue before the Court.

It Is Therefore Ordered, Adjudged and Decreed that R. C. 1333.27 to R. C. 1333.34, inclusive, of the State of Ohio, are violative of Section 1, Article II of the Constitution of the State of Ohio, and therefore are void and are not binding upon the plaintiff herein. It is further ordered that the cross petition of defendant be, and the same hereby is dismissed, at the costs of the defendant herein. Exceptions allowed.

Signed: Eugene R. McNeill,
Judge by assignment.

Opinion of the Court of Appeals for Cuyahoga County.

(Appeal Nos. 25,371 and 25,374.)

(Decided July 13, 1961.)

Skeel, J. These appeals come to this Court on questions of law from judgments entered for the plaintiffs, appellees herein, in the Court of Common Pleas of Cuyahoga County. The actions seek a declaratory judgment declaring the Ohio Fair Trade Act invalid and unconstitutional. Both cases involve similar facts and, with the questions to be determined by this Court the same in each case, the appeals will be considered together. The assignment of error is identical in both cases.

> "For its assignment of error, the defendant-appellant asserts that the Court of Common Pleas of Cuyahoga County erred in declaring Sections 1333.27 through 1333.34 of the Ohio Revised Code to be in violation of the Constitution of the State of Ohio, and

therefore void and not binding upon the plaintiff-appellee, and in granting judgment for the plaintiff-appellee on its petition and dismissing the cross-petition of the defendant-appellant."

The plaintiff, in both cases, is the operator of retail stores selling, among other things, pharmaceutical products. The defendant, in each case, is the manufacturer of pharmaceutical items which are distributed to retailers either directly or through wholesalers or jobbers. They do not sell at the retail level. The products manufactured by these defendants for ultimate use and consumption of retail buyers are manufactured and identified under a trademark, trade or brand name, and sold at retail in free and open competition with commodities of the same general class.

These defendants or their distributors have entered into many written contracts with retail pharmaceutical establishments in Ohio, determining the retail resale price for their trademarked or branded commodities and have caused notice of these contracts and the prices therein established to be served on the plaintiff. The defendants, therefore, claim the protection of the Ohio Fair Trade Act. It is alleged in defendants' cross-petitions that the plaintiff, purchasing the defendants' trademarked or trade name or branded products in interstate commerce, with notice of the established retail resale price in Ohio, is continuing to sell such articles (purchased by them after such notice) at retail at cut-rate prices, below the retail price fixed by the defendants, in total disregard of the Fair Trade Act. It is the contention of the plaintiff, among other claims, that the Ohio Fair Trade Act, passed effective October 22, 1959, constitutes a delegation of legislative power to private persons and for that reason is unconstitutional.

The historical background of the Ohio Fair Trade Act began in 1936 upon the passage of what are now known as

Sections 1333.05 to 1333.10, inclusive, of the Revised Code. This legislation followed after the Congress and the Supreme Court of the United States, by successive acts and decisions, dealt with the right of a manufacturer who identified his products by a trade name or trademark to assure the ultimate consumer that such product was manufactured by him, to protect his "goodwill," created by producing quality merchandise as advertised, from the alleged claims of injury to such "goodwill" by price-cutting retailers. There can be no doubt that the buying public is benefited under modern merchandising methods to be able to identify goods either desired or to be avoided by its trade name or trademark. This Court can take notice of the complete change in merchandising methods over the past seventy-five years. From cracker barrel days when manufacturers found their markets in the locality of their business or sales were made to the ultimate consumer through the retailer's reputation, the retailer in turn being the object of the sales activity of manufacturers or wholesalers, to the present period when the manufacturer points his sales activities to attract the attention of the consuming public and the retailer prepares his stock to meet the demands of the buying public as influenced by the direct advertising of the manufacturer, it must follow that the manufacturer's goodwill is an important and valuable factor in the retail market of today. The manufacturer or wholesale distributor, in seeking to attract the public to buy his products, uses his distinctive trademark or trade name by which his goods are identified. So completely have the processes of merchandising consumer goods changed that the Supreme Court of Ohio held in the case of *Rogers v. Toni Home Permanent Co.* (1958), 167 Ohio St., 244, that an action claiming a breach of an express warranty could be maintained against

the manufacturer without privity of contract, that is where the goods were purchased by the consumer from an independent retailer, the buyer (consumer) being induced to buy the manufacturer's product through the manufacturer's direct advertising and consumer sales efforts. On page 248, the court said:

> "Occasions may arise when it is fitting and wholesome to discard legal concepts of the past to meet new conditions and practices of our changing and progressing civilization. Today, many manufacturers of merchandise, including the defendant herein, make extensive use of newspapers, periodicals, signboards, radio and television to advertise their products. The worth, quality and benefits of these products are described in glowing terms and in considerable detail, and the appeal is almost universally directed to the ultimate consumer. Many of these manufactured articles are shipped out in sealed containers by the manufacturer, and the retailers who dispense them to the ultimate consumers are but conduits or outlets through which the manufacturer distributes his goods. The consuming public ordinarily relies exclusively on the representations of the manufacturer in his advertisements. What sensible or sound reason then exists as to why, when the goods purchased by the ultimate consumer on the strength of the advertisements aimed squarely at him do not possess their described qualities and goodness and cause him harm, he should not be permitted to move against the manufacturer to recoup his loss. In our minds no good or valid reason exists for denying him that right. Surely under modern merchandising practices the manufacturer owes a very real obligation toward those who consume or use his products. The warranties made by the manufacturer in his advertisements and by the labels on his products are inducements to the ultimate consumers, and the manufacturer ought to be held to strict accountability to any consumer who buys the product

in reliance on such representations and later suffers injury because the product proves to be defective or deleterious. See Prosser on Torts (2 Ed.), 506, Section 84; 1 Williston on Sales (Rev. Ed.), 648 to 650, Section 244a."

The liability of the manufacturer would be the same even though his goods were purchased from a price-cutter to his claimed detriment. It would be unusual that modern trends in retail merchandising should thus create a direct liability against a manufacturer for breach of warranty in the representations inducing the sale of his goods made by the manufacturer, the sale being made by an independent retailer, and then to refuse such manufacturer the right to protect his property right in his goodwill, the representations which created the inducing cause of the sale, from damages to such property right by the acts of the retailer selling his goods at cut-rate price in violation of the fair-trade price set on the basis of a contract under the Fair Trade Act.

It is the claim of those supporting "Fair Trade" legislation that the goodwill of the manufacturer created by his direct sales efforts, and in maintaining goodwill by the quality of his products, whereby the consuming public seeks out his goods without any sales effort on the part of the retailer whose only part in the transaction is to have the goods available for sale at the selection of the consumer purchaser, is damaged and his product depreciated by retail price-cutting practices.

In an attempt to protect the value of a manufacturer's goodwill, established by his sales efforts (in support of the quality of his product) in relation to his trademarked goods, from the claimed detriment of price-cutting retailers, both the Legislatures of the several states and the Congress of the United States, beginning at about the

turn of the century, have been attempting to provide regulations to protect the manufacturer's property right in his goodwill from detriment due to the uncontrolled action of price-cutting retailers. The basis of these efforts has been to provide by law the conduct between the manufacturer and the retailer acquiring the goods for resale that will create contractual relations between them by which a minimum retail sales price can be established.

The cases on contracts between manufacturer and retailers, whereby the retailer agrees to maintain a retail price set by the owner of trademarked or trade-named goods by which the manufacturer's goods are identified and who, over the years, has, by expending time and capital, developed what is called "goodwill" in relation to his product, these contracts being identified and characterized as supporting "fair trade," have been upheld as between the parties at common law.

However, after the passage of the "Sherman Act" by the Congress of the United States in 1890, the Supreme Court of the United States in *Dr. Miles Medical Co. v. John D. Parks & Sons Co.*, 220 U. S., 373, 55 L. Ed., 502, 31 S. Ct., 376, held that a contract controlling the resale price between a manufacturer and a retail dealer with regard to goods in interstate commerce constituted a violation of the Sherman Act. The results of this case for a time ended legislative attempts to provide against unfair trade practices alleged to result from price cutting.

A reading of the opinion of Mr. Justice Hughes in the *Dr. Miles Medical Co.* case, which was decided in 1911, makes it clear that the only question decided dealt with contracts in restraint of trade in interstate commerce under the Sherman Act. The Dr. Miles Medical Company, the manufacturer of a non-patented, secret formula remedy, attempted to control the price of its products, both

at retail and wholesale, by two forms of restrictive agreements limiting trade in the products of Dr. Miles to those who became parties to either of such contracts. One contract was a consignment entered into with wholesalers, the other was a retail agency contract made with retail dealers throughout the United States. The defendant was a wholesale drug concern that refused to enter into the required contract but procured Dr. Miles' products for sale at cut-rate prices by inducing those having contractual relations with Dr. Miles to breach their contracts. One question presented was the validity of the consignment contract between Dr. Miles and certain jobbers. This question was not clearly considered because the allegations of the complaint as to the manner in which defendant procured the goods were not set out. The complainant relied on two claims, the first being that its product was an article created under a secret process of which the manufacturer was the owner. This claim was held without legal foundation to protect a contract controlling retail prices, under the Sherman Act. The court said that the question concerns not the process of manufacture but rather an article in commerce. The complainant, the court said, could not rely on the protection afforded a patentee derived by a statutory grant. The second claim was that the complainant was entitled to maintain the restrictions by virtue of the fact that the restrictions related to products of its own manufacture. Ordinarily, there is no way to impose restraints on goods after alienation, with one or two recognized exceptions that are not important here. Such claims are void because the seller parted with its whole interest in the property sold to the vendee by the sale. The basis of the decision is that where the manufacturer or jobber attempts to fix a minimum retail price, the result would be to completely

foreclose the free and unrestricted competition between retailers, who are, in fact, the owners of the goods. The court said, at page 405:

> "Whatever right the manufacturer may have to project his control beyond his own sales must depend, not upon an inherent power incident to production and original ownership, but upon agreement."

The court said that contracts in restraint of trade must be considered in the light of commercial needs at the time such contract is made. On page 406 of the opinion, the following, applicable here, appears:

> "* * * As was said by this court in *Gibbs v. Baltimore Gas Co.*, 130 U. S., p. 409, 'The decision in *Mitchel v. Reynolds*, 1 P. Wms., 181; S. C., Smith's Leading Cases, 407, 7th Eng. ed; 8th Am. ed. 756, is the foundation of the rule in relation to the invalidity of contracts in restraint of trade; but as it was made under a condition of things and a state of society, different from those which now prevail, the rule laid down is not regarded as inflexible, and has been considerably modified. Public welfare is first considered, and if it be not involved and the restraint upon one party is not greater than protection to the other party requires, the contract may be sustained. The question is, whether, under the particular circumstances of the case and the nature of the particular contract involved in it, the contract is, or is not unreasonable. * * *.'
>
> "* * * But there are exceptions: restraints of trade and interference with individual liberty of action may be justified by the special circumstances of a particular case. It is a sufficient justification, and indeed it is the only justification, if the restriction is reasonable—reasonable, that is, in reference to the interests of the parties concerned and reasonable in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the

party in whose favor it is imposed, while at the same time it is in no way injurious to the public."

This view of the law was expressed at a time when trademarks or trade names were not the labels by which the public was induced to select a manufacturer's product because of his direct advertisements and sales efforts, but at a time when the usual action concerning trade names had to do with attempts to fraudently use the labels or trademarks of another. Mr. Justice Oliver Wendell Holmes, in a strong dissenting opinion, suggests that by the slightest change the contract could not be attacked. He states the following:

> "* * * If it should make the retail dealers also agents in law as well as in name and retain the title until the goods left their hands I cannot conceive that even the present enthusiasm for regulating the prices to be charged by other people would deny that the owner was acting within his rights. It seems to me that this consideration by itself ought to give us pause.
>
> "But I go farther. There is no statute covering the case; there is no body of precedent that by ineluctable logic requires the conclusion to which the court has come. The conclusion is reached by extending a certain conception of public policy to a new sphere. On such matters we are in perilous country. I think that, at least, it is safe to say that the most enlightened judicial policy is to let people manage their own business in their own way, unless the ground for interferences is very clear. * * *"

And on page 412, Mr. Justice Holmes said:

> "* * * I think that we greatly exaggerate the value and importance to the public of competition in the production or distribution of an article (here it is only distribution), as fixing a fair price. What really fixes that is the competition of the conflicting desires. * * * As soon as the price of something that we

want goes above the point at which we are willing to give up other things to have that, we cease to buy it and buy something else. * * * The Dr. Miles Medical Company knows better than we do what will enable it to do the best business. We must assume its retail price to be reasonable, for it is so alleged and the case is here on demurrer; so I see nothing to warrant my assuming that the public will not be served best by the company being allowed to carry out its plan. I cannot believe that in the long run the public will profit by this court permitting knaves to cut reasonable prices for some ulterior purpose of their own and thus to impair, if not to destroy, the production and sale of articles which it is assumed to be desirable that the public should be able to get."

After the *Dr. Miles* case, no attempt seems to have been made to legislate on the question of sanctioning by law agreements coming within the oribt of statutes designated as "Fair Trade Laws" until 1931 when California passed as a part of the Business and Professions Code, Sections 16900 to 16905, inclusive. Section 16902 is similar in context, and in purpose identical, to Section 1333.06 and Section 1333.07, Revised Code, a part of the Ohio Fair Trade Act of 1936.

These sections containing the non-signer clause have been held constitutional in a number of cases in California. *Max Factor & Co. v. Kunsman* (1936), 5 Cal. (2d), 446, 55 P. (2d), 177; *Scovill Mfg. Co. v. Skaggs Pay Less Drug Stores* (1955), 45 Cal. (2d), 881, 291 P. (2d), 936.

The *Factor* case was affirmed on appeal to the United States Supreme Court in 299 U. S., 198, 81 L. Ed., 122, 57 S. Ct., 147, in an opinion by Mr. Justice Sutherland, relying on the *Old Dearborn* case, *infra*.

The Illinois Fair Trade Act of 1935 (Smith-Hurd Rev. Statutes, 121½, paragraph 188 *et seq.*), which in substance

is identical with the Ohio Act of 1936, including the non-signer provision, was challenged in the case of *Old Dearborn Distributing Co. v. Seagram-Distillers Corp.* (1936), 299 U. S., 183, 81 L. Ed., 109, 57 S. Ct., 139, 106 A. L. R., 1476, on the ground that it constituted an unlawful delegation of legislative power and denied equal protection of the laws. Paragraphs 1, 2, and 3 of the headnotes of the Lawyer's Edition report of such case provide as follows:

> "1. Property is not taken without due process, in violation of the Fourteenth Amendment, by a state statute which declares that wilfully and knowingly advertising, offering for sale, or selling any commodity at less than the price stipulated in any contract entered into between persons handling a commodity bearing the trademark, brand or name of the producer or owner and which is in fair and open competition with commodities of the same general class produced by others, for the maintenance of a fixed resale price, whether the person so advertising, offering for sale, or selling is or is not a party to such contract, is unfair competition and actionable at the suit of any person damaged thereby, there being nothing in the act to preclude a purchaser from removing the mark or brand from the commodity and then selling it at his own price.
>
> "2. Legislative power is not unconstitutionally delegated by a statute which permits sellers of commodities bearing the trademark, brand or name of the producer or owner to contract with the purchaser for the maintenance of a fixed resale price, and provides that wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract thus entered into, whether the person so advertising, offering for sale or selling is or is not a party thereto, shall be unfair competition and actionable at the suit of any person damaged thereby.

"3. The question whether price cutting by retail dealers in the case of commodities bearing the trade-mark, brand or name of the producer or owner is injurious to the general public is one as to which the legislature's determination is conclusive on the courts."

On pages 194, 195 and 196 of 299 U. S., the court said:

"We find nothing in this situation to justify the contention that there is an unlawful delegation of power to private persons to control the disposition of the property of others, such as was condemned in *Eubank v. Richmond*, 226 U. S., 137, 143; *Seattle Trust Co. v. Roberge*, 278 U. S., 116, 121, 122; and *Carter v. Carter Coal Co.*, 298 U. S., 238, 311. In those cases the property affected had been acquired without any pre-existing restriction in respect of its use or disposition. The imposition of the restriction *in invitum* was authorized after complete and unrestricted ownership had vested in the persons affected. Here, the restriction, already imposed with the knowledge of appellants, ran with the acquisition and conditioned it.

"Nor is Section 2 so arbitrary, unfair or wanting in reason as to result in a denial of due process. We are here dealing not with a commodity alone, but with a commodity plus the brand or trade-mark which it bears as evidence of its origin and of the quality of the commodity for which the brand or trademark stands. Appellants own the commodity; they do not own the mark or the good will that the mark symbolizes. And good will is property in a very real sense, injury to which, like injury to any other species of property, is a proper subject for legislation. Good will is a valuable contributing aid to business—sometimes the most valuable contributing asset of the producer or distributor of commodities. And distinctive trade-marks, labels and brands, are legitimate aids to the creation or enlargement of such

good will. It is well settled that the proprietor of the good will 'is entitled to protection as against one who attempts to deprive him of the benefits resulting from the same, by using his labels and trade-mark without his consent and authority.' *McLean v. Fleming*, 96 U. S., 245, 252. 'Courts afford redress or relief upon the ground that a party has a valuable interest in the good will of his trade or business, and in the trademarks adopted to maintain and extend it.' *Hanover Milling Co. v. Metcalf*, 240 U. S., 403, 412. The ownership of the good will, we repeat, remains unchanged, notwithstanding the commodity has been parted with. Section 2 of the act does not prevent a purchaser of the commodity bearing the mark from selling the commodity alone at any price he pleases. It interferes only when he sells with the aid of the good will of the vendor; and it interferes then only to protect that good will against injury. It proceeds upon the theory that the sale of identified goods at less than the price fixed by the owner of the mark or brand is an assault upon the goodwill, and constitutes what the statute denominates 'unfair competition.' See *Liberty Warehouse Co. v. Burley Tobacco Growers' Assn.*, 276 U. S., 71, 91-92, 96-97. There is nothing in the act to preclude the purchaser from removing the mark or brand from the commodity—thus separating the physical property, which he owns, from the good will, which is the property of another—and then selling the commodity at his own price, provided he can do so without utilizing the good will of the latter as an aid to that end.

"There is a great body of fact and opinion tending to show that price cutting by retail dealers is not only injurious to the good will and business of the producer and distributor of identified goods, but injurious to the general public as well. The evidence to that effect is voluminous; but it would serve no useful purpose to review the evidence or to enlarge further upon the

subject. True, there is evidence, opinion and argument to the contrary; but it does not concern us to determine where the weight lies. We need say no more than that the question may be regarded as fairly open to differences of opinion."

Following that decision, the Congress of the United States passed the Miller-Tydings Act (15 U. S. Code Section 1) which amended the Sherman Act, providing that "fair trade" contracts in interstate commerce do not constitute a violation of any provision of that act. That act was interpreted by the Supreme Court of the United States in the case of *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U. S., 384, 95 L. Ed., 1034, 71 S. Ct., 745, 19 A. L. R. (2d), 1119, where the court held in the syllabus:

> "a) Price fixing is unlawful *per se* under the Sherman Act.
>
> "b) The Miller-Tydings Act exempts 'contracts or agreements prescribing minimum prices for the resale' of the articles purchased, not 'contracts or agreements' respecting the practices of noncontracting competitors of the contracting retailers.
>
> "c) The history of the Miller-Tydings Act supports the construction here given it."

A complete history of the fate of "Fair Trade" statutes and cases, beginning with the *Dr. Miles* case, is set out in an attempt to explain why non-signer provisions of "fair trade" laws were not exempted from the Sherman Act. The opinion was by Mr. Justice Douglas, with a concurring opinion by Mr. Justice Jackson in which Mr. Justice Minton concurred. Mr. Justice Frankfurter, with whom Mr. Justice Black and Mr. Justice Burton joined, wrote a strong dissenting opinion in which they said that it was the intention of Congress to include the non-signer clause of a fair trade law as exempt from the terms of the Sherman Act. On page 398, Mr. Justice Frankfurter said:

"The setting of the Miller-Tydings Amendment and its legislative history remove any lingering doubts. The depression following 1929 gave impetus to the movement for legislation which would allow the fixing of minimum resale prices. In 1931, California passed a statute allowing a manufacturer to establish resale prices binding only upon retailers who voluntarily entered into a contract with him. This proved completely ineffective, and in 1933 California amended her statute to provide that such a contract established a minimum price binding upon any person who had notice of the contract. Grether, Experience in California with Fair Trade Legislation Restricting Price Cutting, 24 Calif. L. Rev., 640, 644 (1936). This amendment was the so-called 'non-signer' clause which, in effect, allowed a manufacturer or wholesaler to fix a minimum resale price for his product. Every 'fair trade' law thereafter passed by any state contained this 'non-signer' clause. By the close of 1936, 14 states had passed such laws. In 1937, 28 more states passed them. Today, 45 out of 48 states have 'fair trade' laws. See Report of the Federal Trade Commission on Resale Price Maintenance XXVII (Dec. 13, 1945).

"A substantial obstacle remained in the path of the 'fair trade' movement. In 1911, we had decided *Dr. Miles Medical Co. v. Park & Sons Co.*, 220 U. S., 373. There, in a suit brought against a 'non-signer,' we held that an agreement to maintain resale prices was a 'contract * * * in restraint of trade' which was contrary to the Sherman Law. To remove this block, the Miller-Tydings Amendment was enacted. It is said, however, that thereby Congress meant only to remove the bar of the Sherman Law from agreements between the manufacturer and retailer, that Congress did not mean to make valid the 'non-signer' clause which formed an integral part of each of the 42 state statutes in effect when the Amendment was passed."

And on page 401, in the dissenting opinion, the following appears:

> "Every one of the 42 state acts which the Miller-Tydings Amendment was to 'back up'—the acts on which the Miller-Tydings Amendment was to place a 'stamp of approval'—contained a 'non-signer' provision. As demonstrated by experience in California, the state acts would have been futile without the 'non-signer' clause. The court now holds that the Miller-Tydings Amendment does not cover these 'non-signer' provisions. Not only is the view of the court contrary to the words of the statute and to the legislative history."

That case was decided May 21, 1951. Congress almost immediately (1952) passed the McGuire Act, 15 U. S. Code, Section 45. Paragraphs 2 and 3 thereof provide:

> "(2). Nothing contained in this section or in any of the Antitrust Acts shall render unlawful any contracts or agreements prescribing minimum or stipulated prices, or requiring a vendee to enter into contracts or agreements prescribing minimum or stipulated prices, for the resale of a commodity which bears, or the label or container of which bears, the trade-mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions under any statute, law, or public policy now or hereafter in effect in any state, territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale.
>
> "(3). Nothing contained in this section or in any of the Antitrust Acts shall render unlawful the exercise or the enforcement of any right or right of action created by any statute, law, or public policy now or

hereafter in effect in any state, territory, or the District of Columbia, which in substance provides that willfully and knowingly advertising, offering for sale, or selling any commodity at less than the price or prices prescribed in such contracts or agreements whether the person so advertising, offering for sale, or selling is or is not a party to such a contract or agreement, is unfair competition and is actionable at the suit of any person damaged thereby."

The purpose of the McGuire Act was stated as follows:

"That it is the purpose of this Act to protect the rights of states under the United States Constitution to regulate their internal affairs and more particularly to enact statutes and laws, and to adopt policies, which authorize contracts and agreements prescribing minimum or stipulated prices for the resale of commodities and to extend the minimum or stipulated prices prescribed by such contracts and agreements to persons who are not parties thereto. It is the further purpose of this Act to permit such statutes, laws, and public policies to apply to commodities, contracts, agreements, and activities in or affecting interstate or foreign commerce."

According to its sponsor, Representative McGuire:

"The McGuire bill is merely permissive. It says to the States, in effect, that Congress recognizes the rights of the States to enact and make effective policies respecting unfair competition. That is all the McGuire bill does and that is all it is intended to do. 98 Cong. Rec., 4979 (May 7, 1952).

"The primary purpose of the McGuire Act was to change, as to future cases, the result reached by the Supreme Court in *Schwegmann Brothers v. Calvert Distillers Corp.*, 341 U. S., 384, 71 S. Ct., 745, 95 L. Ed., 1035 * * *. H. R. Rep. 1437, 82nd Congress, 2nd Session, pp. 1-2, U. S. Code. Congressional and Administrative News 1952, pp. 2181, 2182."

The McGuire Act was almost immediately brought before the court in an action to enjoin a supermarket operator from selling a manufacturer's trademarked product below the minimum retail sale price fixed under the Louisiana Fair Trade Act. *Schwegmann Bros. Giant Super Markets v. Eli Lilly & Co.*, 205 F. (2d), 788. This case was presented on stipulations of fact, so that the issues of both the constitutionality of the McGuire Act and of the nonsigner provisions of the Louisiana Fair Trade Act were clearly presented. The court held that both acts were not subject to the appellant's claims of unconstitutionality. The headnotes provide:

> "1. Question whether distributors were to be protected under fair trade laws, as well as manufacturers or trade-mark owners, is matter addressed to legislative discretion and not subject to court review. * * *
>
> "2. Right of property owner to fix price at which he will sell is an inherent attribute of property itself and, as such, is within protection of due process clauses of federal Constitution. * * *
>
> "3. In enacting fair trade law, it was within legislative province to assume that economic laws would constitute sufficient restraint against capricious or arbitrary price fixing by producer. * * *
>
> "4. Congressional power over interstate commerce is so plenary that Congress may exercise that power by permitting states to regulate phases of interstate commerce.
>
> "5. Under Louisiana Fair Trade Law and federal statute removing ban of federal antitrust laws from price agreements made under state or territorial fair trade acts of designated type, Congress and Legislature intended that restrictions on nonsigners, when imposed as result of contract between producer and distributor, would be given effect. * * *
>
> "6. Where state and federal statutes prohibit horizontal price fixing agreements between manufac-

turers, between producers, between wholesalers, between brokers, between factors, between retailers, or between persons, firms or corporations in competition with each other, making such statutes operative against nonsigners would not make terms of such statutes self-defeating or contradictory. * * *

"7. Louisiana Fair Trade Law and federal statute removing ban on federal antitrust laws from price agreements made under state or territorial fair trade acts of designated type are not violators of due process clauses of federal Constitution on grounds of lack of substantial relation to public welfare and delegation of legislative power to private individuals. * * *"

The Supreme Court of the United States refused certiorari, 346 U. S., 856.

The state of Virginia passed a fair trade act which, by subsequent amendment, contained a non-signer clause. In *Benrus Watch Co., Inc., v. Kirsch*, 198 Va., 94, 92 S. E. (2d), 384, this provision was the subject of an action in which its constitutionality was challenged. The trial court came to the conclusion, along with other reasons for striking down this clause, that the non-signer provision was unconstitutional; but, upon appeal, the Supreme Court of Appeals held that the fair trade act had been repealed by implication by the passage of the "Anti-Monopoly Act of 1950." A new "fair trade act" was passed in 1958. Its provisions were immediately tested in the case of *Standard Drug Co., Inc., v. General Electric Co.*, 202 Va., 367, 117 S. E. (2d), 289. The new act did not contain the so-called "coercive non-signer" provision, but in its stead incorporated a provision that the Supreme Court of Appeals designated as a "permissively contractual provision." While the facts stipulated in the pleadings show that the Standard Drug Company bought the flashbulbs directly from General Electric, there was no direct contract controlling the resale price to others. Standard, however, had

direct notice before the purchase of the bulbs that General Electric was "fair trading" its flashbulbs in Virginia, and it also had notice of the required resale price under the Fair Trade Act. The headnotes of the case, reported in 117 S. E. (2d), 289, in part, provide:

"1. Where retailer contracted directly with manufacturer of trademarked flashbulbs, and, when purchase was made, retailer by expressed terms of contract agreed not to resell at less than specified minimum prices, retailer could not justly complain, in proceeding for declaratory judgment, that Fair Trade Act is unconstitutional, because retailer was not free to use and impair the goodwill of the manufacturer by selling flashbulbs at a price less than retailer agreed to maintain. * * *

"* * *

"3. The Fair Trade Act, which does not contain a 'non-signer' provision, does not violate the equal protection clause of the Fourteenth Amendment to the federal Constitution. * * *

"* * *

"5. The Fair Trade Act, which does not contain a 'non-signer' provision, does not violate constitutional provision that the legislative power shall be vested in a General Assembly, on ground that it delegates legislative power to private persons. * * *

"6. 'Goodwill' of manufacturer or producer is that intangible property right or asset created in public mind by skill, experience, dependability, and integrity of manufacturer or producer of a commodity, and trade-mark or trade name is the symbol of those qualities and constitutes an inseparable part of the 'goodwill.'

"7. The owner or proprietor of goodwill symbolized by his trade-mark is entitled to protection in his property right, and commodities bearing and identified by trademark, brand, or name of producer or

distributor and in free and open competition with commodities of same general class are proper subjects of legislative classification.

"8. The Fair Trade Act does not violate provision of the Constitution that the General Assembly shall not enact any local, special, or private law granting to any private corporation, association, or individual any special or exclusive right, privilege, or immunity. * * *

"9. Title of Fair Trade Act stating that it is an act to permit any producer or distributor to prescribe minimum resale prices of a commodity bearing trade-mark, brand, or name of producer or distributor if commodity is in free and open competition with commodities of the same class does not violate section of the Constitution declaring that no law shall embrace more than one subject which shall be expressed in its title. * * *

"* * *

"13. In determining the meaning of a 'contract' under the Fair Trade Act, Supreme Court of Appeals was not limited to single sentence in act defining a 'contract' but could and should look to other pertinent and explanatory parts of the act. * * *

"14. Acceptance by retailer of commodity for resale with notice attached stating its minimum retail price gives rise to a 'contract' under the Fair Trade Act, and therefore the Fair Trade Act is not in conflict with the Sherman Anti-Trust Act and void, on ground that the Fair Trade Act is in restraint of trade by authorizing price-fixing without a contract. * * *"

That case clearly holds that the Legislature may define the elements of an implied contract as coming about by conduct with knowledge of the facts upon which the agreement is based. No power to fix prices is to be found under the facts of that case, nor do the provisions of the act delegate such power to another. If the retailer does not

care to buy the manufacturer's goods on the terms the manufacturer desires to sell them, or if upon buying goods that have been "Fair-Traded" and the price fixed for resale is made known to the buyer before purchase and he does not want the goods under the conditions stipulated, there is no reason which compels the buyer to enter into a contract to buy, but if he does, he must take the goods upon the terms of the offer. Such a transaction involves the law of contracts. The retailer acts voluntarily and is not otherwise compelled to deal for or take the goods, it, of course, being a part of the provisions of the act that the goods be identified by trademark or trade name and on the market in free and open competition with goods distributed by others in the same general class.

The Supreme Court of Appeals of Virginia resolved all questions of the constitutionality of the new Fair Trade Act of Virginia in favor of the validity of the statute and affirmed the trial court in its decree enjoining Standard from violating the resale price of flash bulbs fixed under the rules of the Virginia Fair Trade Act on the theory of implied contract. This is the only case of a state court of last resort that has considered the constitutionality of a statute identical in purpose to that of the new Fair Trade Act of Ohio. All the other cases cited by the parties concerned non-signer clauses, in purposes similar to that in the former Ohio Fair Trade Act.

With the foregoing background of "fair trade" legislation and the leading cases dealing with the legislative efforts to curb "retail price cutting" of trademarked or tradenamed goods sold in open competition with goods of the same general class, it must be perfectly evident that not only the great majority of state legislatures but also the Congress of the United States have determined that there is need to provide reasonable controls in this field, under

the police powers of the sovereign power. The reasons pro and con, either for or against, such legislation, are set out in great detail by the records of the hearings before the Judiciary Committees of both the House and Senate of the Ohio Legislature when considering the Fair Trade Act passed effective October 22, 1959, over the veto of the Governor by overwhelming majorities in both houses (Sections 1333.27 to 1333.34, inclusive, of the Revised Code). Whether such legislation is desirable is within the sound discretion of the Legislature, about which the courts should not be concerned except to see to it that constitutional limitations are observed and, in case of doubt such doubts should be resolved in favor of the acts of the Legislature.

Without attempting to set out in detail the arguments for or against "fair trade" laws, which now would serve no useful purpose, it might be well just to mention that those against "fair trade" legislation argue that the public is entitled to the benefit of the economies enjoyed by savings in purchasing goods at lower prices from cut-rate establishments, while, on the other hand, the proponents assert that the need to save the local small merchant, who not only sells merchandise in competition with all others but also renders service, is absolutely essential in many cases to the health and welfare of the community. It is claimed that price-cutting survives on the desire of the public to purchase known brands, this desire having been created by the manufacturer's sales efforts on the consumer level. In other words, the price-cutter capitalizes on the goodwill of the manufacturer. The claim that fixing retail prices by the manufacturer under the Fair Trade Act deprives the consumer of the benefits of competition is met by the claim that his goods must be sold in competition with other goods of the same class

under Fair Trade Acts, which fact assures the public of all reasonable benefits of competition. However, as just stated, this is a question of fact for legislative determination. The Legislature, in adopting the Fair Trade Act of 1959, defined the purpose and policy of the Act in Section 1333.27, Revised Code, as follows:

"(A) Sections 1333.27 to 1333.34, inclusive, of the Revised Code are enacted in the exercise of the police powers of the state and in pursuance of the power specifically granted the General Assembly by the people in Section 2 of Article XIII, Ohio Constitution, to regulate the sale and conveyance of personal property, and the purposes of Sections 1333.27 to 1333.34, inclusive, of the Revised Code, are generally to protect and preserve small business, to safeguard the goodwill of trademarks and trade names, to further wholesome competition, to prevent monopoly in the distribution of goods, and to promote the public welfare by securing wider distribution of commodities and an increase in the production thereof, and thereby reducing production and distribution costs, protecting and increasing gainful employment in manufacturing, wholesaling and retailing, all for the benefit of the consumer and the well-being of the citizens of the state.

"(B) It is the further purpose of Sections 1333.27 to 1333.34, inclusive, of the Revised Code, to promote the distribution in commerce in the state of identified merchandise which is in free and open competition with other articles of the same general class. Where fair, equitable, and competitive prices cannot be maintained in all appropriate stages in the distribution of such identified merchandise, the marketing of such merchandise is depressed and the quantity thereof moving in the channels of commerce in the state declines.

"(C) To remove obstructions to the marketing of identified merchandise in commerce which are oc-

casioned by unfair selling practices, it is the policy of the state to afford distributors of identified merchandise an effective means whereby the sale of such merchandise at all appropriate stages of distribution may be consummated at prices adequate to stimulate distribution and low enough to enable distributors of such identified merchandise to compete effectively with those marketing other goods, who by size and dominance may distribute such goods through their own retail outlets or by franchise or consignment methods, and to satisfy the needs of ultimate consumers."

As was stated, the first "Fair Trade Act" was passed in Ohio in 1936 at about the time of the decision of the United States Supreme Court in the *Old Dearborn* case. The first Ohio Fair Trade Act contained the so-called "non-signer" provisions. The act was challenged in 1956 in the case of *Union Carbide & Carbon Corp. v. Bargain Fair, Inc.*, 167 Ohio St., 182, which was decided January 22, 1958. It should be noted that, on page 185 of the opinion, Judge Zimmerman lists some of the states where a fair trade act, including a non-signer clause, had been upheld in its entirety and a few states where the courts had come to the opposite conclusion. The date of the decision is mentioned because, after it was published, holding the non-signer provision unconstitutional as a delegation of legislative power, the Legislature, in the 103rd General Assembly, enacted Sections 1333.27 to 1333.34, inclusive, Revised Code, and in the process did not readopt the non-signer clause but, in its place, followed and somewhat enlarged on the provisions of the Virginia Act setting out the circumstances under which a buyer for wholesale or retail purposes would be bound to maintain "fair trade contracts" with the manufacturer from whom the goods were purchased as provided by the Act. This is accom-

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plished by fixing fair-trade prices by contracts with other retailers, with notice of such prices to the retailer involved, and the retailer then purchasing such articles for resale on the retail market with knowledge that under the law he has impliedly contracted to maintain fair-trade prices by the purchase of goods for resale under such circumstances. The goods, of course, must bear the trademark or trade name of the manufacturer or producer and be sold in competition with other goods of the same class. These provisions of the new act were not in issue before the Supreme Court in the *Bargain Fair* case, and, therefore, that case is not in point on the issues in these cases.

The legislative purpose in passing the "Fair Trade Act" of 1959 was to override the decision of the Supreme Court in the *Bargain Fair* case. The Legislature studiously sought to pass an Act meeting every constitutional objection pronounced by the Supreme Court in "*Bargain Fair.*" There is no purpose in any of the "fair trade" legislation to control prices collaterally. This is clearly shown by the true basic theory of the new acts of Virginia and Ohio. Here, whatever may be said of other fair trade acts, this legislation in Ohio (Sections 1333.27 to 1333.34, inclusive, of the Revised Code) provides the conduct that will create a contract controlling resale prices by the retailer whose conduct in the purchase of the goods comes within the terms of the statute. The Legislature has passed legislation of like character which has been upheld by the courts, such as defining the seller's rights under a conditional sales contract. That such a matter is subject to legislative control cannot be questioned since the Act was passed to prevent the injurious effect of price cutting to the manufacturer's goodwill (found to be a fact by the Legislature) of his trademarked or trade-named goods sold in open competition on the market with like goods sold by

others. The benefit to the retailer of trademarked goods is that created by the manufacturer's goodwill, inducing the ultimate purchaser to seek out the goods.

There can be no question that the seller of personal property, when he parts with title, parts with ownership in the goods, unless by the sales contract, either express, implied or by obligation imposed by law, the buyer agrees or assents to be bound to a particular course of conduct with respect thereto. If so, his obligation is because of a contract, not because of a limitation imposed upon the goods. The manufacturer or distributor of goods, by reason of his own efforts, may create in himself not only the property in the goods he manufactures, but, because of his special efforts as to the quality of such goods and his direct advertising of these goods, he creates in himself what is known as "goodwill" which is an attribute which he believes adds to the value of the goods. The manufacturer does not sell to the buyer any part of his goodwill upon parting with the property in the goods, except that the goods are identified by the trademark or trade name of the manufacturer, and, therefore, resale of the goods is influenced by the manufacturer's reputation and goodwill, to the retailer's benefit. In other words, the price-cutter sells with the help of the goodwill of the manufacturer, which goodwill he did not buy or help to support. If the retailer does not want this added sales inducement, all he has to do is remove identifying marks, sell the goods as his own, and the provisions of the Fair Trade Law no longer apply. Quoting from *Standard Drug Co., Inc., v. General Electric Co., supra* (202 Va., 367), at page 373, the court said, in considering *Old Dearborn Distributing Co. v. Seagram-Distillers Corp., supra*:

> "It was held that the non-signer section was not so arbitrary, unfair or unreasonable as to constitute a

denial of due process, because it dealt not with a commodity alone, but with a commodity plus its brand or trade-mark; that the vendee owns the commodity but not the goodwill that the trade-mark symbolizes; that the non-signer clause 'does not prevent a purchaser of the commodity bearing the mark from selling the commodity alone at any price he pleases. It interferes only when he sells with the aid of the goodwill of the vendor; and it interferes then only to protect that goodwill against injury. * * * There is nothing in the act to preclude the purchaser from removing the mark or brand from the commodity—thus separating the physical property, which he owns, from the good will, which is the property of another—and then selling the commodity at his own price, provided he can do so without utilizing the good will of the latter as an aid to that end.' * * *."

And, on page 375 of 202 Va., the court said:

"It appears that not only does the present Virginia act clearly meet the conditions required by *Old Dearborn* for constitutional validity (state and federal), but by elimination of the 'non-signer' provision and substitution of the provision that permits the voluntary contractual restriction on minimum resale price to be agreed upon by the manufacturer or distributor and retailer, it has removed the chief ground and reason relied upon by courts that have held Fair Trade Acts to be unconstitutional."

In the case of *Scovill Mfg. Co. v. Skaggs Pay Less Drug Stores, supra* (45 Cal. [2d], 881), the court said on page 888:

"* * * Here the acts of private parties in entering into contracts for the sale of commodities constitute the facts in contemplation of which the Legislature acted, and upon the existence of which the provisions of the enactment were to be applicable. The private contracts are no more legislative in character

than are other acts or conduct of private parties undertaken as a prerequisite to the application of a statute. The consequence that the statute has become applicable, and conduct in violation thereof has become actionable is in no way due to the exercise of any assumed legislative power on the part of the contracting parties * * *."

See, also, *Weco Products Co. v. Reed Drug Co.* (1937), 225 Wis., 474, 274 N. W., 426; and *Goldsmith v. Mead Johnson & Co.* (1939), 176 Md., 682, 7 A. (2d), 176.

Most of the litigation in the federal courts involving state fair trade acts was concerned with conflicts created by statutes. The legislative desire to curb monopolies came into conflict with the desire to support acts dealing with fair trade and to define the rights of a manufacturer to defend against the detriment suffered to its goodwill by price cutters. In no case here cited did the federal courts suggest that "non-signer" clauses constituted a delegation of legislative powers, and, in the *Old Dearborn* case, the "non-signer" clause was found not to offend state or federal constitutional provisions.

There can be no doubt that the "non-signer" provision of the first Fair Trade Act of Ohio, and now the implied-contract provision of the new Act, is the very heart of the Act and that, unless such provision can be enforced, the Act is completely useless.

From the foregoing analysis of the case law and the statutes with which they deal, and the clear purpose of the great majority of the Legislatures of the several states and the Congress of the United States to prevent "price cutting" as inimical to the common good, primarily as to the retail sale of trade-marked or trade-named goods offered for sale on the open market in competition with other goods of the same class below the price designated by the

owner of the goodwill of the goods identified by his trade name or trademark, the obligation of the retailer to maintain fair-trade prices being founded on contractual relations between the manufacturer or dealer and the retailer, as defined by the Fair Trade Act, we must conclude that the Act (Sections 1333.27 to 1333.34, inclusive, Revised Code) was passed within the constitutional powers of the Legislature of Ohio, and that its provisions violate no constitutional rights of the plaintiff or any others in a like situation.

The judgment of the Court of Common Pleas, therefore, is reversed and final judgment entered for the defendants.

Judgments reversed.

KOVACHY, *P.J.*, concurs.

HURD, J., dissenting. On this appeal, the single question presented is whether the 1959 Fair Trade Act (Sections 1333.27 to 1333.34, inclusive, Revised Code) has the effect of nullifying the decision of the Supreme Court in *Union Carbide & Carbon Corp. v. Bargain Fair, Inc.*, 167 Ohio St., 182. In that case, Judge Zimmerman, at page 186, said:

"A majority of this Court has reached the conclusion that Section 1333.07, Revised Code, which prohibits those who are not parties to the stipulated-price contract from selling trade-marked items at a price lower than that stipulated by the manufacturer, is unreasonable and unenforceable and constitutes an unauthorized exercise of the police power in that there is no substantial relation to the public safety, morals or general welfare. Moreover, it contravenes the 'due process' provision of the Ohio Bill of Rights by arbitrarily and monopolistically denying a seller, who has not entered into any price-fixing contract with the

manufacturer, the privilege of disposing of his own property on terms of his own choosing, *and in addition delegates legislative power and discretion to private persons.*" (Emphasis supplied.)

In the case at bar, McNeill, J., sitting by assignment in this county, held in effect that the 1959 Fair Trade Act was subject to certain objections which the Supreme Court found to exist in the 1936 Fair Trade Act (Sections 1333.06 to 1333.10, Revised Code) for two reasons, namely, (1) that the Supreme Court in the *Union Carbide* case rejected the theory of the adequacy of proprietary interest as a basis for fair-trade legislation, and (2) that regardless of any other changes in the Act, the delegation of legislative power and discretion to private persons remains. These provisions were specifically interdicted by the Supreme Court in the *Union Carbide* case.

Inferentially, it should be noted that two other Common Pleas Courts have held that the 1959 Act is subject to certain of the objections found by the Ohio Supreme Court to exist in the 1936 Act.

In the case of *Helena Rubinstein, Inc., v. Cincinnati Vitamin & Cosmetic Distributors Co.*, 84 Ohio Law Abs., 143, Judge Gusweiler of the Common Pleas Court of Hamilton County held the 1959 Act to be unconstitutional on all the grounds asserted by the Supreme Court in the *Union Carbide* case.

The latest decision on the subject was rendered April 14, 1961, by Judge Leach of the Common Pleas Court of Franklin County in the case of *Bulova Watch Co., Inc., v. Ontario Store of Columbus, Inc.*, 86 Ohio Law Abs., 585, who held, on demurrer, in a very able opinion, that the 1959 Act is unconstitutional as a delegation of legislative power to private persons and, in that respect, comes within

the prohibition of the decision of the Supreme Court in the *Union Carbide* case. The logic and reasoning of these opinions, as well as that of McNeill, J., in the instant case, while not in any sense binding upon this Court, are, in my opinion, strongly persuasive on reason, logic and authority.

The great vice in the 1959 Act (as in the 1936 Act) is the delegation of legislative power to private persons without any proper formula, standard or control whatsoever. Thus, those who have the most to gain are granted the greatest delegation of legislative power, and private persons are permitted unlimited license to fix and set prices at will. Thus, the major effect is to permit private persons, by the delegation of legislative power, if they so determine, to increase and maintain high prices, particularly of drugs and vitamins. In the ordinary course of events, this will lead to a monopoly and make it difficult for persons of ordinary means to purchase regularly those aids to health and well-being so necessary under modern conditions. In this respect, the interests of the consuming public are totally ignored and the retailer is prevented from conducting his business as he sees fit.

Inasmuch as I am in accord with the opinion of the trial judge in the case at bar, I feel that no useful purpose would be served by a further discussion of the issues in this dissenting opinion. Therefore, I conclude that the judgment of the Common Pleas Court should be affirmed for the reasons generally set forth in the opinion of the trial judge. In so concluding, I am not unmindful of the case of *Standard Drug Co., Inc., v. General Electric Co.*, 202 Va., 367, 117 S. E. (2d), 289, discussed at great length in the majority opinion. While that case may be somewhat persuasive, it must be distinguished from the instant case in certain respects. (See the opinion of Leach,

J., in the *Bulova Watch Company* case, *supra* [86 Ohio Law Abs., 585].) Regardless of any arguments to the contrary, this Court must be bound by the decision of the Ohio Supreme Court in the *Union Carbide* case which is presently the established law of this state. It is the prerogative of the members of the Supreme Court to determine what weight it shall give to decisions of courts of sister states.

Judgment of the Court of Appeals of Cuyahoga County.

(Dated September 27, 1961.)

(Like Orders filed September 27, 1961, Case Nos. 25,371 & 25,374.)

This cause came on to be heard upon appeal on questions of law, assignment of error, bill of exceptions and exhibits thereto, transcript of the docket and journal entries in the Court of Common Pleas of Cuyahoga County, Ohio, and briefs, and was argued by counsel and submitted to the Court.

Upon consideration whereof, this Court finds as follows in the record and proceedings aforesaid:

1. Sections 1333.27 through 1333.34 of the Ohio Revised Code are valid, lawful, and enforceable enactments of the Ohio General Assembly and are neither in violation of the Constitution of the State of Ohio, nor in violation of the Constitution of the United States.

2. The Court of Common Pleas of Cuyahoga County erred to the prejudice of the appellant in declaring said sections to be in violation of the Constitution of the State of Ohio, and therefore void and not binding upon the appellee, and in granting judgment for the appellee on its petition and dismissing the cross-petition of the appel-

lant, when judgment should have been entered for the appellant on such petition and said cross-petition should not have been dismissed.

It is therefore considered, ordered, and adjudged by this Court that the judgment of the Court of Common Pleas of Cuyahoga County be and the same hereby is reversed and held for naught. And the Court coming now to render the judgment which the Court of Common Pleas of Cuyahoga County ought to have rendered, it is ordered that Sections 1333.27 through 1333.34 of the Ohio Revised Code be and the same hereby are declared to be valid, lawful, and enforceable enactments of the Ohio General Assembly and neither in violation of the Constitution of the State of Ohio nor of the Constitution of the United States; that final judgment be and the same hereby is now entered for the appellant on the petition filed in this cause in the Court of Common Pleas of Cuyahoga County by the appellee; that this cause be remanded to the Court of Common Pleas of Cuyahoga County to carry this judgment into effect and for execution, and for further proceedings according to law with respect to the cross-petition filed in this cause by the appellant; and that the appellant recover from the appellee his costs herein expended. To all of which, appellee, by counsel, excepts.

Signed: JULIUS M. KOVACHY,
Presiding Judge.

Opinion of the Supreme Court of Ohio.

(Appeal Nos. 37,320 and 37,321.)

(Decided May 8, 1963.)

APPEALS from the Court of Appeals for Cuyahoga County.

These two causes originated in the Court of Common Pleas of Cuyahoga County, in each of which is sought a declaratory judgment that the Ohio Fair Trade Act, Sections 1333.27 through 1333.34, Revised Code, is invalid and unconstitutional. The facts in both cases are similar and the law applicable is the same. The appeals will be treated together, since the assignments of errors in both cases are exactly the same.

Hudson Distributors, Inc., a Michigan corporation, operates a number of retail stores in Cleveland. It brought these actions for the purpose of testing the constitutionality of the 1959 Ohio Fair Trade Act. In one case, Hudson named as defendant the Eli Lilly Company, and, in the other, The Upjohn Company. Both companies had complied with the Fair Trade Act, and Hudson had entered into no written contract with either. Hudson procured the merchandise of Lilly from a distributor in Detroit. Upjohn sold direct to the retailer or at times to the wholesaler. Hudson sold the merchandise for less than the fair-trade price.

In both causes, the Court of Common Pleas found that the Fair Trade Act is unconstitutional as an unlawful delegation of legislative power.

Those judgments were reversed by the Court of Appeals, and the causes are before this Court pursuant to the allowance of motions to certify the records.

GRIFFITH, J. In *Union Carbide & Carbon Corp. v. Bargain Fair, Inc.* (1958), 167 Ohio St., 182, we deter-

mined that a prior Fair Trade Act (1936) containing a nonsigner provision was invalid. The syllabus reads:

> "Section 1333.07, Revised Code, a part of the Ohio Fair Trade Act, which prohibits those who are not parties to a price-fixing contract between the producer of a trade-marked commodity and another from selling such commodity for less than the price stipulated in such contract, represents an unauthorized exercise of the police power in a matter unrelated to the public safety, morals or general welfare, delegates legislative power to private persons, unconstitutionally denies the owner of property the right to sell it on terms of his own choosing and is invalid."

In the *Bargain Fair* case we were concerned primarily with the nonsigner provisions. Following the judgment in that case, a new Ohio Fair Trade Act (128 Ohio Laws, 698) was enacted, which act became effective October 22, 1959, and it is this legislation that is now being assaulted and is the sole cause of this controversy.

The heart of the new act, the implied contract doctrine is spelled out in Section 1333.28 (I), Revised Code. "Contract" is defined therein as "any agreement, written or verbal, or arising from the acts of the parties." That section provides further that a person who acquires a commodity "directly from the proprietor or otherwise" after actual notice that the proprietor has established a minimum resale price is bound to observe that price; and that such a person by accepting the commodity "shall thereby have entered into an agreement with such proprietor not to resell such commodity at less than the minimum price stipulated therefor by such proprietor."

A person who acquires such commodity after actual notice and then sells, offers to sell or advertises to sell such commodity at a price lower than the established minimum

resale price commits an act of unfair competition. Section 1333.32 (A), Revised Code.

Section 2, Article XIII, should not be read out of the Ohio Constitution or rendered meaningless. The provision means just what it says—the General Assembly can pass laws "regulating the sale and conveyance" of personal property. The new Ohio Fair Trade Act is just such a law. The new act is much more comprehensive than the prior act and introduces into the law two entirely new concepts.

It should be pointed out at this time that one element of the act cannot be overemphasized, namely, that the act applies only to trademark items which are in free and open competition with other goods of the same nature in the same general area. This is one of the most important features of this act. The act does not restrain competition since it may only apply to merchandise which is in free and open competition with goods of a like nature.

The first of the new concepts incorporated in this new act is contained in Section 1333.31, Revised Code, which reads as follows:

> "A proprietor shall retain a proprietary interest in any commodity with respect to which he is a proprietor after he has sold it to distributors, so long as such commodity continues to be identified by his trademark or trade name, by reason of his interest in stimulating demand for such commodity through effective distribution to ultimate consumers and of his interest in continuing protection of the goodwill associated with his trademark or trade name."

By this section, the General Assembly has extended the original concept of the trademark, that of protecting the owner from others marketing their goods under his trademark, to include as a part of the ownership a continuing proprietary interest in the trademark or trade name on the merchandise to the extent that the proprietor

can control the resale price of the merchandise even after it has left his possession and ownership. It is contended that the General Assembly has no power to create such ownership. In this the opponents of this legislation fail to take into consideration that all ownership of property and the incidents relating thereto arise only as a matter of law. Inasmuch as all ownership of property arises only by law, the law may also impose such reasonable conditions and incidents of ownership as are necessary to protect not only the owner but the public in general, *i.e.*, such conditions as are necessary for the general welfare. Many such conditions are imposed by law. For example, land may be conveyed only by following the procedure prescribed by statutes, motor vehicles may be transferred only by certificate of title, and it is only because the law so provides that property may be transmitted by will. It is fundamental that property may be used only so long as its use does not interfere with the public welfare. Thus, although one may own a motor vehicle, the use thereof is subject to strict regulation. The ownership of property secured by the Constitution is necessarily subject to regulation by law. The General Assembly, after extensive and exhaustive hearings, determined that such extension of proprietary rights was necessary not only to protect the property rights incorporated in the ownership of a trademark or trade name but also to protect the small-business man and the public in general.

In such a matter, in the absence of conclusive evidence to the contrary we cannot substitute our judgment for that of the legislative body. Where the wisdom of a legislative act is debatable, the legislative determination must stand.

"Where such questions of fact [the need for fair-trade legislation] are fairly debatable, this Court does not sub-

stitute its judgment for that of the General Assembly but accepts and carries into effect its declared policy." *Kinsey Distilling Sales Co. v. Foremost Liquor Stores, Inc.*, 15 Ill. (2d), 182, 188.

This brings us to a consideration of the second of the new concepts incorporated in the new act. Section 1333.28 (I), Revised Code, reads as follows:

> " 'Contract' means any agreement, written or verbal, or arising from the acts of the parties. The establishment by a proprietor of a minimum resale price for any commodity pursuant to the provisions of Section 1333.29 of the Revised Code and the proprietor's permission for a distributor to acquire and use the proprietor's interest in the trademark or trade name in reselling the commodity shall constitute a contract and sufficient consideration from the proprietor for a promise by the distributor not to sell such commodity at less than the minimum price established by the proprietor. Any distributor (whether he acquires such commodity directly from the proprietor or otherwise) who, with notice that the proprietor has established a minimum resale price for a commodity, accepts such commodity shall thereby have entered into an agreement with such proprietor not to resell such commodity at less than the minimum price stipulated therefor by such proprietor."

This provision is the core of the act. When read in conjunction with the rest of the act, it provides in essence that, when a retailer with notice that an item has been fair-traded procures it for resale, he is deemed to have entered into an implied contract with the owner of the trademark that he will sell the item at the fair-trade price.

There is no question that express price maintenance contracts are valid. *Garst v. Harris*, 177 Mass., 72; *Grogan v. Chaffee*, 156 Cal., 611.

The statute creates an implied contract by act of the parties. The doctrine of implied contracts is almost as old as the law of contracts. The simple illustration of the appellees that, where one takes a candy bar from a grocer's shelf and eats it, he obligates himself to pay for it is a basic example of an implied contract by act. No word need be said; conduct creates the contract.

It must be remembered that there is no compulsion on a retailer to handle the trademarked goods. Since the act applies only to goods which are in free and open competition with goods of the same nature, he may select other goods for sale. If he selects the fair-trade goods, it is his voluntary act, and he must abide by the conditions imposed thereon by the proprietor. The fact that he may not like the conditions is inconsequential. Most of us are forced by circumstances to enter into contracts where we do not like the conditions imposed on us, yet if we voluntarily accept the merchandise we must abide by the conditions attached thereto. For example, in purchasing a home, there are in most instances restrictive covenants as to use. We may not like such conditions, but if we accept the contract we must abide thereby. Liking or not liking the conditions of acquiring property has no effect on the validity of the contract. If the retailer chooses to accept the goods, he is bound by the conditions imposed thereon, in this instance, the fair-trade price.

It is stated as follows in *Old Dearborn Distributing Co. v. Seagram-Distillers Corp.*, 299 U. S., 183, 193, 194:

> "Appellants here acquired the commodity in question with full knowledge of the then-existing restriction in respect of price which the producer and wholesale dealer had imposed, and, of course, with presumptive if not actual knowledge of the law which authorized the restriction. Appellants were not ob-

liged to buy; and their voluntary acquisition of the property with such knowledge carried with it, upon every principle of fair dealing, assent to the protective restriction, with consequent liability under Section 2 of the law by which such acquisition was conditioned. Cf. *Provident Institution v. Jersey City*, 113 U. S., 506, 514-515; *Vreeland v. O'Neil*, 36 N. J. Eq., 399, 402; same case on appeal, 37 N. J. Eq., 574, 577."

Once trademarked goods come into Ohio the law imposes certain conditions thereon, and they are held subject to those conditions.

Legislative conditions and contracts are not new in the law, they appear in many instances, and once the parties enter into an agreement they are bound by the legislative contract no matter what the parties intended. This is exemplified in the law relating to insurance contracts wherein statutory provisions and conditions are imposed in every insurance contract no matter what the intent of the parties. This is true as to statutory bonds, negotiable instruments, bulk sales and mechanics' liens.

This provision of the law is essentially very simple. It is simple contract law. The owner of a trademark offers his goods bearing that mark which are in free and open competition in the open market for resale, on condition that the retail price be maintained at a certain level. This is basic contract law; an offer may be made on condition. Under the Ohio law, the owner of the trademark, once the goods enter into Ohio, has by statute sufficient interest to control the resale price of the goods. The acceptance of this offer is purely voluntary, but if it is accepted it must be accepted on the imposed conditions or not at all. If the offer is accepted, the retailer in consideration of the good-will attached to the trademark and the demand created by the owner thereof contracts to sell it at the agreed price.

We come now to a consideration of the power of the General Assembly to enact these sections. The avowed legislative purpose is contained in Section 1333.27, Revised Code, which reads as follows:

"(A) Sections 1333.27 to 1333.34, inclusive, of the Revised Code, are enacted in the exercise of the police powers of the state and in pursuance of the power specifically granted the General Assembly by the people in Section 2 of Article XIII, Ohio Constitution, to regulate the sale and conveyance of personal property, and the purposes of Sections 1333.27 to 1333.34, inclusive, of the Revised Code, are generally to protect and preserve small business, to safeguard the goodwill of trademarks and trade names, to further wholesome competition, to prevent monopoly in the distribution of goods, and to promote the public welfare by securing wider distribution of commodities and an increase in the production thereof, and thereby reducing production and distribution costs, protecting and increasing gainful employment in manufacturing, wholesaling and retailing, all for the benefit of the consumer and the well-being of the citizens of the state.

"(B) It is the further purpose of Sections 1333.27 to 1333.34, inclusive, of the Revised Code, to promote the distribution in commerce in the state of identified merchandise which is in free and open competition with other articles of the same general class. Where fair, equitable, and competitive prices cannot be maintained in all appropriate stages in the distribution of such identified merchandise, the marketing of such merchandise is depressed and the quantity thereof moving in the channels of commerce in the state declines.

"(C) To remove obstructions to the marketing of identified merchandise in commerce which are occasioned by unfair selling practices, it is the policy of the state to afford distributors of identified mer-

> chandise an effective means whereby the sale of such merchandise at all apppropriate stages of distribution may be consummated at prices adequate to stimulate distribution and low enough to enable distributors of such identified merchandise to compete effectively with those marketing other goods, who by size and dominance may distribute such goods through their own retail outlets or by franchise or consignment methods, and to satisfy the needs of ultimate consumers."

Whether such conditions and controls are within the police power as declared by the General Assembly must be determined by an examination of known economic conditions.

Even to the most casual observer it is readly apparent that the small independent merchant is gradually being forced out of business through the operation of the large merchandising establishments. Even without discounting fair-trade items, these large merchants through their tremendous buying power are able by quantity buying to legitimately undersell the small merchant and to attract his trade. When, in addition to this legitimate underselling, the discounter uses fair-trade items as a come-on, selling items at cost or even at a loss to entice customers into his store, it is apparent that the small merchant will be doomed, he cannot afford to compete on this level, and his customers will go to the discounter to buy. Yet this small independent merchant is a necessary and integral part of the community. It is to him that the consumer turns for little-called-for items that the discounter does not choose to handle, and quite frequently it is to him that the customer turns for the personal service not rendered by the large discount establishments. Yet, as a result of the discounting of fair-trade merchandise, so much of his trade is being drained from him that he can-

not afford to continue his business. Clearly, it is to the advantage of the general public that such establishments be preserved.

So much for the small-business man. We turn now to a consideration of the right to protect the owner of the trademark. It is beyond question that the goodwill of a trademark is a valuable property right. In *McLean v. Fleming*, 96 U. S., 245, 252, the court said:

> "Everywhere courts of justice proceed upon the ground that a party has a valuable interest in the goodwill of his trade, and in the labels or trademark which he adopts to enlarge and perpetuate it. Hence it is held that he, as proprietor, is entitled to protection as against one who attempts to deprive him of the benefits resulting from the same, by using his labels and trademark without his consent and authority."

The majority of present-day consumer purchasing is by brand name. Today the public demand necessary for retail selling is created to a great extent not by the retailer but by the manufacturer, the owner of the trademark. One of the greatest expenses of modern day merchandising is the creation of the demand for the product. This expense, which is borne in a great part by the proprietor, at times may even exceed the original manufacturing cost of the product itself. The value of any trademark is, of course, the demand for the product which it represents. The continued discount selling of a trademarked product eventually cheapens it in the eyes of the purchasing public. If such product is sold at a reduced price the public will eventually get the idea that the product is cheap and turn to others, seeking higher quality merchandise. It does not occur to them that the quality is good and that the discounter is using the merchandise as a loss leader

to advertise his store. This fact is well borne out by the fact that it is the owner of the trademark who urges that his merchandise be fair-traded. If discount selling did not injure his total sales, he would have no interest in the retail price. It must be remembered that the proprietor sells his goods at the same price and reaps the same unit profit no matter what price the ultimate consumer pays. Clearly, the owners of trademarks have discovered that discount selling of their products eventually cheapens them in the eyes of the public with the ultimate effect of injuring the value of the trademark or trade name and reducing their total sales. See *National City Bank v. National City Window Cleaning Co.*, 174 Ohio St., 510.

When the general welfare of the small merchant is considered together with the necessity of protecting the goodwill and value attached to a trademark, it was clearly within the legislative power to enact such protective legislation, and the court will not substitute its judgment in this instance for that of the General Assembly. In *Old Dearborn v. Seagram, supra,* at pages 195 and 196, the court said:

> "There is a great body of fact and opinion tending to show that price cutting by retail dealers is not only injurious to the goodwill and business of the producer and distributor of identified goods, but injurious to the general public as well. The evidence to that effect is voluminous; but it would serve no useful purpose to review the evidence or to enlarge further upon the subject. True, there is evidence, opinion and argument to the contrary; but it does not concern us to determine where the weight lies. We need say no more than that the question may be regarded as fairly open to differences of opinion. The legislation here in question proceeds upon the former and not the latter view; and the legislative determination in that respect, in the circumstances here disclosed, is conclusive so far as

this court is concerned. Where the question of what the facts establish is a fairly-debatable one, we accept and carry into effect the opinion of the Legislature."

Two other matters are urged as to the constitutionality of this legislation.

The first of these relate to the delegation of legislative power as to price fixing.

In the first place, this is not price fixing as commonly understood in the law. Here we have the producer of a commodity, which is in free and open competition with other goods of the same nature, fixing the price only of his own commodity; and not a fixing of prices for all the commodities in the same field. Here if a producer fixes his prices too high the consumer will turn to other producers for his needs.

Second, this is not legislative price fixing but price maintenance contracts between the producer and retailer, and the fact that such a contract may in some instances be implied does not affect the validity of the act. We have already found that such contracts are valid. Thus, this contention is not well founded.

The final contention is that such act violates the constitutional right of one to sell his own property on his own terms. It having been determined that the implied contracts herein are valid, the retailer takes the goods on the conditions of the offer and thus voluntarily agrees to comply with the fair-trade price.

The General Assembly has re-enacted fair-trade laws in Ohio. In so doing it met constitutional objections to the former act (1936) expressed by this Court in the *Bargain Fair* case. The nonsigner provision of the old law was eliminated. A retailer will be bound to fair-trade a product only by his own contract, either a written contract or a

contract implied under the specific statutory language from the retailer's conduct in accepting the product for resale after notice of its being subject to fair trade.

It is the intention of the new act to declare and protect the proprietary interest of a manufacturer in his trademark and the goodwill attached to it. Cf. *National City Bank v. National City Window Cleaning Co., supra.* The means employed by the act is the long and well established legal doctrine of implied contract. None of the constitutional attacks on this new act have merit.

For the reason that fewer than six members of the court are of the opinion that the Fair Trade Act is unconstitutional, the court cannot so declare it. Section 2, Article IV, Constitution.

The judgments of the Court of Appeals are affirmed.

Judgments affirmed.

TAFT, C. J., and HERBERT, J., concur.

ZIMMERMAN, MATTHIAS, O'NEILL and GIBSON, JJ., dissent.

ZIMMERMAN, J., dissenting. The writer dissents for the reason that, in his opinion, the new Fair Trade Act (Section 1333.05 *et seq.*, Revised Code) possesses the same vulnerability as did the old act since, in effect, it attempts arbitrarily to bind nonsigners of price-fixing contracts by artificial and unauthorized legislative fiat and undertakes to control the price at which trademarked merchandise may be sold by the purchasers thereof, who bear no relationship whatsoever to the producers of such merchandise.

In my view, the reasons for holding a part of the old act unconstitutional, as expressed in the case of *Union Carbide & Carbon Corp. v. Bargain Fair, Inc.*, 167 Ohio

St., 182, 147 N. E. (2d), 481, are still valid in relation to the new act.

MATTHIAS, O'NEILL and GIBSON, JJ., concur in the foregoing dissenting opinion.

Judgment of the Supreme Court of the State of Ohio.
(Dated May 8, 1963.)

(Like Orders filed May 8, 1963, in appeal, Case Nos. 37,320 and 37,321.)

This cause, here on appeal from the Court of Appeals for Cuyahoga County, was heard in the manner prescribed by law. On consideration thereof, the judgment of the Court of Appeals is affirmed; and it appearing that there were reasonable grounds for this appeal, it is ordered that no penalty be assessed herein.

It is further ordered that the defendant appellee recover from the plaintiff appellant its costs herein expended; that a mandate be sent to the Court of Common Pleas to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Cuyahoga County for entry.

APPENDIX B.

Statutes Involved.

Ohio Fair Trade Act of 1959

(Ohio Revised Code Sections 1333.27 through 1333.34)

Sec. 1333.27. (A) Sections 1333.27 to 1333.34, inclusive, of the Revised Code are enacted in the exercise of the police powers of the state and in pursuance of the power specifically granted the general assembly by the people in Section 2 of Article XIII, Ohio Constitution, to regulate the sale and conveyance of personal property, and the purposes of sections 1333.27 to 1333.34, inclusive, of the Revised Code, are generally to protect and preserve small business, to safeguard the good will of trade-marks and trade names, to further wholesome competition, to prevent monopoly in the distribution of goods, and to promote the public welfare by securing wider distribution of commodities and an increase in the production thereof, and thereby reducing production and distribution costs, protecting and increasing gainful employment in manufacturing, wholesaling and retailing all for the benefit of the consumer and the well-being of the citizens of the state.

(B) It is the further purpose of sections 1333.27 to 1333.34, inclusive, of the Revised Code, to promote the distribution in commerce in the state of identified merchandise which is in free and open competition with other articles of the same general class. Where fair, equitable, and competitive prices cannot be maintained in all appropriate stages in the distribution of such identified merchandise, the marketing of such merchandise is depressed and the quantity thereof moving in the channels of commerce in the state declines.

(C) To remove obstructions to the marketing of identified merchandise in commerce which are occasioned by unfair selling practices, it is the policy of the state to afford distributors of identified merchandise an effective means whereby the sale of such merchandise at all appropriate stages of distribution may be consummated at prices adequate to stimulate distribution and low enough to enable distributors of such identified merchandise to compete effectively with those marketing other goods, who by size and dominance may distribute such goods through their own retail outlets or by franchise or consignment methods, and to satisfy the needs of ultimate consumers.

Sec. 1333.28. As used in sections 1333.27 to 1333.34, inclusive, of the Revised Code:

(A) "Commodity" means any subject of commerce.

(B) "Producer" means any grower, baker, maker, manufacturer, bottler, packer, converter, processor, or publisher.

(C) "Wholesaler" means any person selling a commodity other than a producer or retailer.

(D) "Retailer" means any person engaged in business selling a commodity to consumers for use.

(E) "Distributor" means any person who acquires a commodity for the purpose of resale.

(F) "Person" means an individual, corporation, partnership, association, joint-stock company, business trust, or any unincorporated organization.

(G) "Trade-mark" means any word, name, symbol, or device, or any combination thereof, used by a producer or distributor to identify his commodity and distinguish it from that produced or distributed by others.

(H) "Trade name" means personal names, and any word, words, symbol, or symbols, used by producers or

distributors to identify their companies, firms, or corporations.

(I) "Contract" means any agreement, written or verbal, or arising from the acts of the parties. The establishment by a proprietor of a minimum resale price for any commodity pursuant to the provisions of section 1333.29 of the Revised Code and the proprietor's permission for a distributor to acquire and use the proprietor's interest in the trade-mark or trade name in reselling the commodity shall constitute a contract and sufficient consideration from the proprietor for a promise by the distributor not to sell such commodity at less than the minimum price established by the proprietor. Any distributor (whether he acquires such commodity directly from the proprietor or otherwise) who, with notice that the proprietor has established a minimum resale price for a commodity, accepts such commodity shall thereby have entered into an agreement with such proprietor not to resell such commodity at less than the minimum price stipulated therefor by such proprietor.

(J) "Notice" means actual notice given by any method provided in section 1333.30 of the Revised Code, or otherwise established by legally admissible evidence.

(K) "Proprietor" means:

(1) A person who identifies a commodity produced by him by the use of his trade-mark or trade name, unless he has specifically granted to another person sole authority to establish minimum resale prices for such commodity;

(2) A person who identifies a commodity distributed by him by the use of his own trade-mark or trade name;

(3) A person who has been specifically granted by the producer or distributor of a commodity which is identified by the trade-mark or trade name of such

producer or distributor the sole authority to establish minimum resale prices for such commodity in the state.

Sec. 1333.29. (A) It shall be lawful, anything in sections 1331.01 to 1331.14 of the Revised Code or otherwise provided in the Revised Code to the contrary notwithstanding, for a proprietor to establish and control by notice to distributors or by contract, stipulated minimum resale prices for a commodity of which he is the proprietor and which is in free and open competition with commodities of the same general class produced by others and offered for sale in the same general market area. Such minimum resale prices may be differentiated as to various levels of distribution, provided such differentiations are not otherwise unlawfully discriminatory. Such prices may be changed from time to time by written notice to distributors who acquired such commodity with notice of any established minimum resale price. A proprietor may so establish such minimum resale prices for his wholesale distributors, notwithstanding section 1333.34 of the Revised Code, even though he sells such commodity to retailers in competition with such wholesale distributors, if such sales to retailers are made at prices not less than those he establishes for such wholesale distributors for comparable sales.

(B) Any such contract or notice may contain the following provisions:

(1) That the buyer will not resell such commodity at less than the minimum resale price stipulated by the proprietor thereof for the level of distribution at which the buyer resells the same;

(2) That the buyer will require from any distributor to whom he may resell such commodity an agreement that such distributor will not, in turn,

resell such commodity at less than the minimum resale price stipulated by the proprietor thereof for the level of distribution at which such distributor resells and that such distributor, if he resells to another distributor, will make the same agreement with the distributor to whom he may resell;

(3) That the seller will require from any other distributor to whom he may sell other items of such commodity an agreement that such distributor will not, in turn, resell such commodity at less than the minimum resale price stipulated by the proprietor for the level of distribution at which such distributor resells and that such distributor, if he resells to another distributor, will make the same agreement with the distributor to whom he may resell.

(C) Any contract or notice authorized by and entered into pursuant to any of the provisions of sections 1333.27 to 1333.34, inclusive, of the Revised Code, shall be for the benefit of the proprietor and any distributor who is bound by a similar contract or notice.

Sec. 1333.30. Actual notice of stipulated minimum resale prices may be given to any person by mail, through advertising, or through notice attached to merchandise, to containers, packages, or dispensers thereof, or on the invoice therefor, or imparted orally. Deposit in the United States mail, with postage prepaid, of a letter properly addressed to a distributor and specifying minimum resale prices established by a proprietor shall constitute prima facie evidence of actual notice to said distributor of such resale prices. The acquisition of or dealing in merchandise clearly marked, or enclosed in containers, packages or dispensers clearly marked, or the invoice for which was clearly marked, with minimum resale prices established by a proprietor shall be conclusive evidence of actual notice of such minimum resale prices. Actual notice may

also be otherwise established by legally admissible evidence. A person with actual notice of any applicable minimum resale price is thereby charged with notice that such a price is subject to change.

Sec. 1333.31. A proprietor shall retain a proprietary interest in any commodity with respect to which he is a proprietor after he has sold it to distributors, so long as such commodity continues to be identified by his trade-mark or trade name, by reason of his interest in stimulating demand for such commodity through effective distribution to ultimate consumers and of his interest in continuing protection of the good will associated with his trade-mark or trade name.

~~Sec. 1333.32.~~ (A) Except as provided in section 1333.33 of the Revised Code, it shall be unlawful and an act of unfair competition for any distributor with notice that a proprietor has established a stipulated minimum resale price for a commodity of which he is the proprietor or for any distributor who is in contract with a proprietor not to sell a commodity for which such proprietor has established a stipulated minimum resale price, at less than such stipulated minimum resale price to sell, offer to sell, or advertise such a commodity for sale at a price lower than such stipulated minimum resale price. In determining whether the sale or offer to sell or advertisement for sale of any commodity is below the stipulated minimum resale price established by the proprietor for such commodity there shall be deducted from the price at which such commodity is sold, offered for sale, or advertised for sale the value of any article or thing of exchange or extrinsic value or any concession made, whether by the giving of coupons or otherwise, which is given or to be given in connection with

such sale or offering to sell and the sale or offering for sale of such commodity with any other commodity for a single or combined price, or the giving of or offering to give any credit or allowance in excess of the actual market value thereof, or the failure to add any tax occasioned by or upon the sale of such commodity shall also be taken into consideration in determining whether such sale, offer to sell, or advertisement for sale is below the minimum resale price stipulated for such commodity by the proprietor; provided the allowance by a distributor to his customers of trading stamps or other redeemable certificates, when the amount or value of such allowance does not exceed three per cent of such stipulated minimum resale price, where the posted or advertised price of any commodity or commodities is not less than the stipulated minimum resale price thereof, shall not constitute the offering or making of a gift or concession prohibited by this section nor a violation of any of the provisions of sections 1333.27 to 1333.34, inclusive, of the Revised Code.

(B) Any person suffering or reasonably anticipating damage by reason of a violation of this section may bring suit in any court of competent jurisdiction in the state to

(1) Recover the amount of damages sustained as a result thereof;

(2) Obtain injunctive relief whether or not specific monetary damages are established;

(3) Recover the costs of suit, including reasonable attorney fees, which costs and attorney fees may be recovered whether or not specific monetary damages are established.

(C) It shall be no defense to a prayer for an injunction in any such action that there is an adequate remedy at law.

Sec. 1333.33. It shall be a defense to an alleged violation of section 1333.32 of the Revised Code, for a distributor to prove that a commodity has been advertised, offered for sale, or sold:

(A) In closing out such distributor's stock of such commodity for the bona fide purpose of discontinuing dealing in such commodity and plain notice of that fact is given to the public; provided, the distributor of such stock shall give to the proprietor of such commodity prompt and reasonable notice in writing of his intention to close out such stock, and an opportunity to purchase such stock of such commodity at the original invoice price;

(B) When the stock of such commodity is altered, secondhand, damaged, defaced, or deteriorated and plain notice of that fact is given to the public in the advertisement and sale thereof, such notice to be conspicuously displayed in all advertisements and affixed to the commodity;

(C) By an officer acting under an order of court;

(D) After the distributor has removed from such commodity all trace of the proprietor's identifying trade-mark or trade name and that in such sale or offer to sell or advertisement for sale no statement, representation, or suggestion of any kind is made which would identify such commodity with the trade-mark or trade name of the proprietor.

Sec. 1333.34. Sections 1333.27 to 1333.34, inclusive, of the Revised Code, shall not, except as otherwise specifically provided in section 1333.29 of the Revised Code, apply to any contract, agreement, or understanding between or among producers, or between or among distributors, or between or among wholesalers.

Miller-Tydings Act.

"*Section 1.* **Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal:** ***Provided, That nothing herein contained shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trade mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 5, as amended and supplemented, of the Act entitled 'An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes,' approved September 26, 1914; Provided further, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. * * *"***

The McGuire Act.

"*Sec.* 5. (a) (1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.

(2) Nothing contained in this Act or in any of the Antitrust Acts shall render unlawful any contracts or agreements prescribing minimum or stipulated prices, or requiring a vendee to enter into contracts or agreements prescribing minimum or stipulated prices, for the resale of a commodity which bears, or the label or container of which bears, the trade-mark, brand, or name of the producer or distributor of such commodity and which is free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale.

(3) Nothing contained in this Act or in any of the Antitrust Acts shall render unlawful the exercise or the enforcement of any right or right of action created by any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia, which in substance provides that willfully and knowingly advertising, offering for sale, or selling any commodity at less than the price or prices prescribed in such contracts or agreements whether the persons so advertising, offering for sale, or selling is or is not a party to such a contract or agreement, is unfair competition and is actionable at the suit of any person damaged thereby.

(4) Neither the making of contracts or agreements as described in paragraph (2) of this subsection, nor the exercise or enforcement of any right or right of action as described in paragraph (3) of this subsection shall constitute an unlawful burden or restraint upon, or interference with, commerce.

(5) Nothing contained in paragraph (2) of this subsection shall make lawful contracts or agreements providing for the establishment or maintenance of minimum or stipulated resale prices on any commodity referred to in paragraph (2) of this subsection, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other."

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In the Supreme Court of the United States

No. 489

OCTOBER TERM, 1963.

HUDSON DISTRIBUTORS, INC.,
Appellant,

v.

THE UPJOHN COMPANY,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO.

JURISDICTIONAL STATEMENT.

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No. ________

OCTOBER TERM, 1963.

HUDSON DISTRIBUTORS, INC.,
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THE UPJOHN COMPANY,
Appellee.

On Appeal From the Supreme Court of the State of Ohio.

JURISDICTIONAL STATEMENT.

Appellant appeals from the judgment of the Supreme Court of Ohio entered on June 12, 1963 denying appellant's Application for Rehearing of the judgment of the Supreme Court of Ohio rendered on May 8, 1963 which had affirmed the judgment of the Court of Appeals of Cuyahoga County, Ohio. Appellant submits this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINIONS BELOW.

The Opinion of the Trial Court in this case, the Court of Common Pleas for Cuyahoga County, Ohio, is not officially reported. It is reported in 1960 C.C.H. Trade Cases Paragraph 69,778. The Opinion is printed in Appendix A hereto beginning at page 28. The judgment entered thereon is printed in Appendix A at page 38.

The Opinion of the Court of Appeals for Cuyahoga County, including the dissent, is reported in 117 Ohio App. 207. This Opinion is printed at pages 39 to 71, Appendix A. The Judgment entered thereon appears in Appendix A at page 71.

The Opinion of the Supreme Court of Ohio, including the dissent, is reported in 174 Ohio St. 487. This Opinion is printed at pages 73 to 86 in Appendix A. The Judgment entered thereon appears in Appendix A at page 86.

JURISDICTION.

The suit was brought by Hudson Distributors, Inc. ("Hudson"), in the Court of Common Pleas of Cuyahoga County, Ohio, against The Upjohn Company ("Upjohn") under the Declaratory Judgment Statute of Ohio for a judgment declaring the 1959 Fair Trade Act to be null and void as violative of the Supremacy Clause (Article VI, Clause 2) of, and the Fourteenth Amendment to the Constitution of the United States, and repugnant to various provisions of the Constitution of the State of Ohio.

On July 28, 1960 the Court of Common Pleas of Cuyahoga County held that the Fair Trade Act of 1959 was unconstitutional under the Constitution of Ohio. The Federal grounds were not reached. The Court of Appeals for Cuyahoga County by a vote of 2 to 1 reversed the Court of Common Pleas on July 13, 1961 and sustained constitutionality.

Hudson then appealed the decision to the Supreme Court of Ohio. On May 8, 1963, the Ohio Supreme Court, without discussing the federal issues, affirmed the judgment of the Court of Appeals for Cuyahoga County by a vote of three justices in favor of affirmance and four justices against. Although a majority of the justices felt the Statute to be unconstitutional, the Ohio Supreme Court

could not so hold by reason of Article IV, Section 2 of the Ohio Constitution which requires that, except in affirmance of a judgment below, at least six members of the Supreme Court must be of the opinion that a State Statute is unconstitutional before the Court may so declare.

On May 22, 1963, Hudson filed its Petition for Rehearing in the Ohio Supreme Court which was denied by the Court on June 12, 1963. On August 1, 1963, Hudson filed in the Supreme Court of Ohio its Notice of Appeal to the Supreme Court of the United States, copies of which were also filed with the Court of Appeals of Cuyahoga County and the Court of Common Pleas of Cuyahoga County.

The Jurisdiction of the Supreme Court of the United States to review the decision by appeal from the judgment of the Supreme Court of the State of Ohio is conferred by Title 28, United States Code, Section 1257(2). This jurisdiction is sustained by *Metlakatla Indian Community; Annette Islands Reserve v. Egan*, 369 U. S. 45 (1962) and *Reconstruction Finance Corp. v. Beaver County, Pa.*, 328 U. S. 204 (1946).

STATUTES INVOLVED.

The statutory provisions involved are the Miller-Tydings Amendment to the Sherman Act of July 2, 1890, 15 U. S. C. Sec. 1, 50 Stat. 693; the McGuire Act of 1952, 15 U. S. C. Sec. 45(a)(1)-(5), 66 Stat. 632; the Ohio Fair Trade Act of 1959, Ohio Revised Code Secs. 1333.27 through 1333.34, 128 Ohio Laws 698. They are printed in Appendix B hereto.

QUESTIONS PRESENTED.

1. Whether the Ohio Fair Trade Act violates the Supremacy Clause of the Federal Constitution in that:

(a) The Act attempts to repeal Section 5(a)(5) of the McGuire Act and Section 1 of the Sherman Anti-Trust Act by authorizing the proprietor of a trademark or trade name to establish minimum resale prices for wholesalers with whom the proprietor is in competition;

(b) The Act attempts to repeal Section 5(a)(5) of the McGuire Act and Section 1 of the Sherman Anti-Trust Act by authorizing the proprietor of a trademark or trade name to compel its distributors to enter into "horizontal" (i..e at the same level of distribution), price fixing agreements or unlawful boycotting arrangements with other distributors;

(c) The Act attempts to repeal Sections 5 (a) (2), (3), (4) and (5) of the McGuire Act and Section 1 of the Sherman Anti-Trust Act by authorizing the proprietor of a trademark or trade name, who need not necessarily be the owner thereof, to establish minimum resale prices by notice to distributors without the consensual agreement intended by Congress.

2. Whether the Ohio Fair Trade Act is unconstitutional under the Due Process Clause of the Fourteenth Amendment to the Federal Constitution in that the Act confers upon the proprietor of a trademark or trade name a "proprietary interest" in a commodity despite the sale of and receipt of the full price for such commodity with the trademark or trade name affixed thereon, and by reason of such "proprietary interest," empowers the proprietor to compel a remote non-consenting vendee to adhere to a minimum resale price.

3. Whether the federally unconstitutional provisions of the Ohio Fair Trade Act are so commingled and entwined with the remainder of the Act and so inseparable therefrom as to make the entire Act unconstitutional under the Federal Constitution.

STATEMENT OF THE CASE.

On January 22, 1958 the Supreme Court of Ohio nullified the non-signer clause of the Ohio Fair Trade Act of 1936 (O. R. C. Sec. 1333.07) as constituting a deprivation of property without due process of law and permitting the delegation of legislative power to private persons, in contravention of the Ohio Constitution. *Union Carbide & Carbon Corp. v. Bargain Fair, Inc.*, 167 Ohio St. 182, 147 N. E. 2d 481.

Following this decision retailers in Ohio, who had not signed fair trade contracts, were free to set retail prices on trademarked and trade name merchandise in conformity with their own pricing structure.

In the summer of 1958 Hudson opened its store in downtown Cleveland, Ohio, where it sold brand name drug merchandise including merchandise manufactured by Upjohn at prices below fair trade prices. Hudson has never used brand name merchandise as "bait" or as "loss leaders."

In June of 1959, the legislature of Ohio passed a new fair trade act, to take effect on October 22, 1959. (Appendix B, p. 87.) The new legislation was intended to override the decision of the Supreme Court in the *Bargain Fair* case. See opinion in this case in the Court of Appeals for Cuyahoga County, Appendix A, at p. 64.

Prior to the effective date of the statute, Upjohn sent a letter to Hudson stating that Upjohn had established fair trade prices for its products and that such prices would be

enforced when the statute became effective. Shortly after receipt of this notice, on Aug. 28, 1959, before the new act took effect, Hudson filed suit in the Court of Common Pleas of Cuyahoga County, Ohio, against Upjohn Company for a declaratory judgment to test the constitutionality of the Fair Trade Act of 1959. Upjohn filed a cross-petition for injunctive relief, money damages and costs.

In its petition, Hudson attacked the Act as repugnant to various provisions of the Ohio Constitution, and as violative of the Supremacy clause and the Due Process clause of the Fourteenth Amendment to the Federal Constitution. These respective federal and state grounds were briefed, argued and pressed by Hudson in the trial court and in the appellate courts. Hudson's standing to challenge the constitutionality of the Act has never been questioned.

It is undisputed that Hudson purchases no merchandise from Upjohn and that all of its requirements are purchased from a wholesaler in Michigan. Upjohn has conceded that, apart from the fiat of the "Fair Trade" law, there was no consensual agreement with Hudson for the maintenance of resale prices.

Upjohn sells directly to retailers and also through wholesalers. *These wholesalers sell to retailers with whom Upjohn also does business.* Pursuant to the Ohio Act, Upjohn has established resale prices at the wholesale level as well as at the retail level.

On October 22, 1959, the date the statute became effective, Hudson also brought a declaratory judgment suit against Eli Lilly & Company ("Lilly") which had given notice of the establishment of fair trade prices. A cross petition for relief under the statute was filed in this case.

It was stipulated between Hudson on the one hand, and Upjohn and Lilly on the other, that the cases would go forward on the limited question of constitutionality raised in the Hudson petitions.

The Upjohn and Lilly cases were tried by the Court of Common Pleas of Cuyahoga County in the summer of 1960. On July 28, 1960, the trial judge, after reviewing the entire Fair Trade Act, held the Act to be repugnant to the Ohio Constitution under the *Bargain Fair* decision for the reason that "Regardless of any other changes in the Act, this delegation of legislative authority remains." (Appendix A, p. 37.) The trial court found it unnecessary to pass upon the federal questions.

Upjohn and Lilly appealed to the Court of Appeals for Cuyahoga County, which, by a vote of two judges to one, reversed the Court of Common Pleas on July 13, 1961 and upheld the constitutionality of the statute. In its opinion the Court of Appeals only considered the state constitutional issues. However, the first paragraph of its journal entry states that:

> "1. Sections 1333.27 through 1333.34 of the Ohio Revised Code are valid, lawful, and enforceable enactments of the Ohio General Assembly and are neither in violation of the Constitution of the State of Ohio, *nor in violation of the Constitution af the United States.*" (Appendix A, p. 71.)

Hudson appealed to the Ohio Supreme Court. The Upjohn and Lilly cases were argued together before the court which issued its joint opinion on May 8, 1963, reported in 174 Ohio St. 487. The judgment of the Court of Appeals was affirmed by a minority of three justices who confined their opinion to the state constitutional issues and held that the infirmities of the non-signer clause nullified

in *Bargain Fair* were remedied by the new statute. In summary the Court said: "None of the constitutional attacks on this new Act have merit." (Appendix A, p. 85.)

Inferentially the Ohio Supreme Court sustained constitutionality on federal grounds.

In other Ohio counties final judgments have been entered holding the entire Fair Trade Act to be unconstitutional. See *Helena Rubinstein v. Cinci Vitamin & Cosmetic Distributors, Inc.*, 84 Ohio L. Abs. 143, 167 N. E. 2d 687 (Common Pleas, Hamilton County [Cincinnati], 1960) and *Bulova Watch Co., Inc. v. Ontario Stores of Columbus, Inc.*, 86 Ohio L. Abs., 585, 176 N. E. 2d 527 (Common Pleas, Franklin County [Columbus], 1961) affirmed without opinion by the Court of Appeals for Franklin County, June 19, 1962. That same day, on the ground of the unconstitutionality of the statute, the Franklin County Court of Appeals in nine separate cases, affirmed judgments of the Court of Common Pleas below which had sustained demurrers to and dismissed fair trade petitions filed by various drug and cosmetic manufacturers. *Mead Johnson & Co. v. Columbus Vitamin & Cosmetic Distributors, Inc.*, 1962 C. C. H. Trade Cases, Par. 70,360.

In the *Bulova Watch* case, the Court of Common Pleas of Franklin County held the statute to be repugnant to the Miller-Tydings Act and the McGuire Act, hence unconstitutional under the Supremacy Clause of the United States Constitution and the Court of Appeals for Franklin County affirmed. Both the *Helena Rubinstein* and *Bulova Watch* decisions remain in full force and effect in the second and third most populous counties of Ohio.

THE QUESTIONS ARE SUBSTANTIAL.

This case brings before the Court an attempt by the Legislature of Ohio to repeal a substantial segment of the Federal antitrust laws. If more states enact like legislation, any need for congressional action to enlarge the McGuire Act will largely disappear, for the states will accomplish that which the Congress had thus far declined to do. The Ohio Fair Trade Act of 1959 (*Ohio Revised Code* Sections 1333.27 through 1333.34, 128 Ohio Laws 698), under the guise of authorizing fair trade contracts by "notice," openly invites unlawful horizontal price fixing agreements at every level of distribution in direct contravention of the Miller-Tydings Act and the McGuire Act.

1. It has long been held that the exemptions provided by the Miller-Tydings Act and the McGuire Act, are in derogation of the antitrust laws and must be strictly construed. *Ethyl Corporation v. United States*, 309 U. S. 436 (1940); *United States v. Univis*, 316 U. S. 241 (1942); *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U. S. 384 (1951). In the case of *United States v. McKesson & Robbins*, 351 U. S. 305 (1956) this Court stated at p. 316:

> "Congress has marked the limitation beyond which price fixing cannot go. We are not only bound by these limitations but we are bound to construe them strictly, since resale price maintenance is a privilege restrictive of a free economy."

Both of these exempting statutes expressly forbid horizontal price fixing agreements, arrangements and combinations.[1]

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[1] The Miller-Tydings Act provides in part:

"that the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein

(*Continued on following page*)

This Court has expressly held in *United States v. McKesson & Robbins*, 351 U. S. 305 (1956) that fair trade contracts between a manufacturer, who acts as a wholesaler, and its independent competing wholesalers are void under the antitrust laws. The doctrine of *McKesson & Robbins* was extended to prohibit fair trade contracts between a manufacturer who maintains retail outlets and independent retailers of his products. *Esso Standard Oil Company v. Secatore's Inc.*, 246 F. 2d 17 (1st Cir., 1957). The concurring opinion of Judge Aldrich in the *Secatore's* case expressed the view that actual competition is not necessary to nullify such contracts. By the same token, nonsigners of such contracts are without obligation to honor fair trade prices.

The Legislature of Ohio, in passing the Fair Trade Act of 1959, gave no consideration whatever to the strict limitations of the antitrust law exemptions provided by the Miller-Tydings Act and the McGuire Act. It enacted a statute which expressly permits horizontal price fixing in Ohio, the Federal antitrust laws as construed by this Court notwithstanding.

(*Continued from preceding page*)

involved, *between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other.*" (Emphasis supplied.)

This prohibition is reaffirmed by the McGuire Act Section 5(a)(5), which states:

"Nothing contained in paragraph (2) of this subsection shall make lawful contracts or agreements providing for the establishment or maintenance of minimum or stipulated resale prices of any commodity referred to in paragraph (2) of this subsection, *between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other.*" (Emphasis supplied.)

Horizontal price fixing is expressly authorized at the wholesale level by Ohio Revised Code Section 1333.29 (A), which provides in part:

> "A proprietor may so establish such minimum resale prices for his wholesale distributors, notwithstanding section 1333.34 of the Revised Code, *even though he sells such commodity to retailers in competition with such wholesale distributors*, if such sales to retailers are made at prices not less than those he establishes for such wholesale distributors for comparable sales." (Emphasis supplied.)

This provision is apparently designed to suit the convenience of many integrated manufacturers such as the Upjohn Company, who sell directly to retailers, while at the same time selling to wholesalers with whom they compete for the retailer's business.[2]

In an apparent effort to stop the "diverting" of fair-traded merchandise to cut-rate outlets, the legislature enacted further provisions granting carte blanche to horizontal price fixing at *every* level of distribution. The statute defines a distributor as "Any person who acquires commodities for the purpose of resale." Revised Code

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[2] In an article entitled "Fair Trade, Alias 'Quality Stabilization': Status, Problems and Prospects" by Professor Glen E. Weston appearing in 22 *A.B.A. Antitrust Section* 76 (1963) at pages 93-94 Professor Weston analyzes proposed New York legislation which is virtually identical with O. R. C. Sec. 1333.29 (A):

> "One particularly questionable feature of the bill would permit a manufacturer-wholesaler to make Fair Trade agreements with its own competing wholesalers so long as the manufacturer-wholesaler does not cut prices and does not wholesale products of other brand owners. This appears to be based on a narrow reading of the *McKesson* rule, limiting it to facts existing in that case but which were not regarded as significant by the Supreme Court. This provision would seem to be of doubtful validity because it probably conflicts with the Supreme Court's interpretation of the McGuire Act."

Section 1333.28(E). It is axiomatic that this definition encompasses businessmen at the same functional level of distribution, including those in actual competition with one another.

Under the aegis of Revised Code Section 1333.29(B)(2), a proprietor can agree with a distributor of his product that such distributor

> "will require from any distributor to whom he may resell such commodity an agreement that such distributor will not, in turn, resell such commodity at less than the minimum resale price stipulated by the proprietor thereof for the level of distribution at which such distributor resells *and that such distributor, if he resells to another distributor, will make the same agreement with the distributor to whom he may resell;*"

Ohio Revised Code Section 1333.29(B)(3) permits the proprietor to make a like promise to the distributor that the *proprietor*

> "* * * will require from any other distributor to whom he may sell other items of such commodity an agreement that such distributor *will not, in turn, resell such commodity at less than the minimum resale price stipulated by the proprietor for the level of distribution at which such distributor resells and that such distributor, if he resells to another distributor, will make the same agreement with the distributor to whom he may resell.*"

By the mechanisms provided in these statutory sections, a proprietor can deputize and compel every person in his distribution system to assist in the enforcement of fair trade prices, both inside and outside of Ohio. The stream of interstate and intrastate commerce at wholesale and retail levels is effectively dammed up unless resale is effected within lines demarcated by the proprietor, i.e.:

(a) resale by the initial vendee at the fair trade price for his particular level of distribution; and

(b) resale to subsequent vendees who observe fair trade at their respective levels of distribution.

Upon a proprietor's invoking the statutory scheme, a wholesaler may not sell the trademarked goods to another wholesaler, nor may a retailer sell to another retailer except on pain of first exacting an agreement as to the price at which the respective vendee will resell. This is indeed the very evil prohibited by the federal enabling legislation. The unlawful clogging of the flow of interstate commerce would appear to be self-evident, cf. *United States v. Utah Pharmaceutical Assn.*, 201 F. Supp. 29 (1962), *affirmed without opinion*, 371 U. S. 949.

It would seem crystal clear that the Ohio Legislature has misconceived its function in the federal scheme of things.

The Ohio Legislature has no power to enlarge the scope of the Miller-Tydings Act and the McGuire Act in order to permit horizontal price fixing both inside and outside the State of Ohio. Power to amend the antitrust laws is vested solely with the Congress. In the face of a growing number of state Supreme Court decisions nullifying state fair trade laws, bills have been introduced with regularity in Congress to enact national fair trade legislation. In the more recent sessions of Congress, these have been designated as "Quality Stabilization" bills. Each of these bills has provisions amending the antitrust laws to permit horizontal price fixing.

On September 12, 1962, the House Committee on Interstate and Foreign Commerce reported on H. J. Res. 636 in Report No. 2352. Section 14 of this bill expressly sanctions horizontal price fixing by providing:

"(14) All such rights and remedies provided in paragraphs (7) to (14), inclusive, *shall be also available to any owner of a brand, name, or trademark who, in the sale of goods identified by such brand, name, or trademark shall compete, at any level of distribution, with any reseller offering such goods*: Provided, That such owner shall sell such identified goods at any level of distribution only at the price or within the price range currently established by such owner for that level of distribution." (Emphasis supplied.)

The House committee was not at all hesitant in explaining the purpose of paragraph 14. The report on H. J. Res. 636 states at page 15:

"* * * *This is intended to overrule the so-called McKesson & Robbins doctrine* (see 351 U. S. 305), *in that the right of a brandname owner to establish prices shall not be denied in cases where the owner engages in multiple distribution, even if he sells in competition with his reseller customers.* Such would be the case if a brandname owner, manufacturing a trademarked commodity, also operated retail stores, at the same time selling to wholesalers and retailers." (Emphasis supplied.)

Before the Ohio General Assembly can constitutionally move to legalize horizontal price fixing, it must first await appropriate enabling legislation by the Congress. In its zeal to overcome the *Union Carbide and Carbon Corp. v. Bargain Fair, Inc.* decision, *supra*, the Ohio legislature acted precipitously and wholly beyond the bounds of Federal sanction. Almost four years have elapsed since the passage of the Fair Trade Act of 1959 and the Congress has still seen fit to retain the Miller-Tydings Act and the McGuire Act in their original form.

Upjohn has availed itself of the horizontal price-fixing provisions of the Ohio Act by entering into agreements

with wholesalers of its products with whom it competes and by fixing wholesale resale prices to retailers. Upjohn calls these agreements "del credere agency" contracts. However, according to the branch sales manager of its Cleveland District, Upjohn regards wholesale pricing catalogues furnished to such wholesalers as fair trade wholesale schedules. The titles given to these agreements with wholesalers cannot mitigate their true nature as horizontal price-fixing agreements among competing wholesalers and manufacturers in violation of the Sherman Act. *United States v. Masonite Corp.*, 316 U. S. 265 (1942).

2. The Miller-Tydings Act and McGuire Act exempted from the antitrust laws *contracts* or *agreements* which meet specific standards provided therein. In addition, the McGuire Act in section 5(a)(3) sanctions rights of action created by any state in favor of trademark or trade name owners against any person offering or selling commodities at prices less than those prescribed by fair trade *contracts* or *agreements*, whether or not the offending person is a party to any such *contract* or *agreement*. When Congress enacted these laws, it intended that as a prerequisite to enforcement against nonsigners, there first be in existence *contracts* or *agreements* voluntarily entered into establishing fair trade prices.

This Court in *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U. S. 384 at 388, explained what these words mean as they appear in the Miller-Tydings Act:

> "*The Act sanctions only 'contracts or agreements.' If a distributor and one or more retailers want to agree, combine or conspire to fix a minimum price, they can do so if state law permits.* Their contract, combination or conspiracy—hitherto illegal—is made lawful.
>
> "They can fix minimum prices pursuant to their contract or agreement with impunity. *When they seek, however, to impose price-fixing on persons who have*

not contracted or agreed to the scheme, the situation is vastly different. That is not following the path of consensual agreement; *that is resort to coercion.*" (Emphasis supplied.)

The Miller-Tydings requirement of fair trade "contracts or agreements" was reenacted without change in the McGuire Act where the statutory phrase is reiterated at least seven times.

Notwithstanding the clear intention of Congress, the Legislature of Ohio decided to devise its own criteria for contracts or agreements. Permeating the Fair Trade Act of 1959 is a dogma that contracts to abide by fair trade prices no longer require the consent of the respective parties.

In the decision below, the Ohio Supreme Court at 174 Ohio St. 488 recognized that without the "contract by notice" provision, the Fair Trade Act of 1959 is meaningless.

> "*The heart of the new act, the implied contract doctrine, is spelled out in Section 1333.28(I), Revised Code.* 'Contract' is defined therein as 'any agreement, written or verbal, or arising from the acts of the parties.' That section provides further that a person who acquired a commodity 'directly from the proprietor or otherwise' after actual notice that the proprietor has established a minimum resale price is bound to observe that price; and that such a person by accepting the commodity 'shall thereby have entered into an agreement with such proprietor not to resell such commodity at less than the minimum price stipulated therefor by such proprietor.' "

Under the provision of Revised Code Section 1333.29 (A), mere notice is sufficient. That this conception is totally inimical to and incompatible with the express wording of the Federal antitrust laws has been recognized by

the courts of Franklin County, Ohio in the case of *Bulova Watch Co., Inc. v. Ontario Stores of Columbus, Inc.*, 86 Ohio L. Abs. 585, 176 N. E. 2d 527 (1961), affirmed without opinion by the Court of Appeals for Franklin County on June 19, 1962.[3]

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[3] At 86 Ohio L. Abs. 598-599, the court observed:

"One other aspect of this case should be mentioned. As mentioned before, the Miller-Tydings Act exempted from the Sherman Act only 'contracts and agreements' prescribing minimum resale prices. It is clear, we believe, from the Opinion of the Court in the *Schwegmann* case that this Act authorized *only* contracts in the sense of truly consensual agreements without resort to coercion or compulsion, including state legislative compulsion. *In other words, we think it clear that, at least in the absence of the McGuire Act, actions taken under the 1959 Ohio Act to establish minimum resale prices would be in violation of the Sherman Act*, for the reason that a legislatively established 'agreement,' absent true common law 'mutual assent' or 'meeting of the minds,' would not come within the purview of the words 'contracts or agreements' as contained in the *Miller-Tydings Act*. See also *Johnson & Johnson v. Charmley Drug Co., supra.*

"*The McGuire Act, Title 15, Sec. 45, P. (2d), U. S. C., also refers to 'contracts or agreements' and must be given the same meaning.* Then in Par. (3) it makes lawful the enforcement of any right created by state law which, in substance, provides that wilfully and knowingly selling at less than the price 'prescribed in *such contracts or agreements*' is actionable 'whether the person so * * * selling is or is not a party to *such a contract or agreement*.' *We think it clear that the words 'contract or agreement' as employed in Par. (3) as well as Par. (2) of the McGuire Act, have the same meaning as these same words employed in The Miller-Tydings Act, as construed by the Schwegmann case.*

"This situation has given rise to the proposed Harris Act, (H. R. 1253), which would amend the McGuire Act to permit the establishing of minimum resale prices by notice.

"*Thus it would appear that the provision of the 1959 Ohio Act* requiring *no* 'contracts or agreements' within the purview of the Miller-Tydings Act or the McGuire Act, *would not fall within the scope of such acts and any minimum resale prices established without such 'contracts or agreements' would be in violation of the Sherman Act.*" (Emphasis added.)

The statute as interpreted by the court below makes short shrift of the consensual basis for fair trade "contracts or agreements" intended by Congress. The "contract by notice" provisions of the Ohio Act have as much suggestion of consent as a military command.

Under Revised Code Section 1333.30, this notice, which of itself constitutes a contract, may be imparted by mail, through advertising, by means of attaching prices to the merchandise, or even orally.

Revised Code Section 1333.28(I) provides that a distributor who accepts merchandise with notice that fair trade prices have been established

> "*shall thereby enter into an agreement with such proprietor not to resell such commodity at less than the minimum price stipulated therefore by such proprietor.*"

whether or not he deals directly with the manufacturer.

Hudson has done everything within its power to reject any fair trade contracts with Upjohn. It purchased no merchandise from this company and had no direct dealings with it. By the institution of the within declaratory judgment litigation Hudson could hardly have manifested its intentions more clearly. Nevertheless, Upjohn has sued Hudson for the enforcement of fair trade prices contending that Upjohn and Hudson have entered into fair trade contracts as defined by the Ohio statutes.

The Congress has recognized that the Miller-Tydings Act and the McGuire Act forbid contracts by *notice*. In 1959, prior to the effective date of the Ohio Fair Trade Act, the "Harris Bill" and like legislation to establish a national fair trade program were before the House Committee on Interstate and Foreign Commerce. The Harris Bill (H. R. 1253) would amend the McGuire Act to au-

thorize state legislation permitting the establishment of minimum resale prices by *notice* in addition to the presently authorized means, to wit, by contracts or agreements. The Committee report on H. R. 1253, H. R. Rep. No. 467, dated June 9, 1959, specifically recognized that as of that time notices had no efficacy in establishing fair trade prices. At page 18 of the Report appears the following explanation of a section of the Bill which would permit the establishment of fair trade prices by *notice*:

> "The only change proposed in paragraphs (2), (3) and (4) is to add a reference to 'notices' in the provisions referring to contracts and agreements. *This change is made so that where a State law permits a manufacturer to establish a stipulated or minimum resale price by the giving of notice, the McGuire Act provisions will apply to the same extent that they now do in the case of State laws which permit the establishment of such prices by contracts or agreements between manufacturers and their distributors.* The committee has been informed that Virginia has modified its Fair Trade Act so as to permit the establishment of stipulated or minimum prices by notice." (Emphasis supplied.)

The Harris Bill never came to a vote. The requirement of the Miller-Tydings Act and the McGuire Act that there be contracts or agreements based upon actual consent remains unchanged.[4]

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[4] In his article appearing in 22 *A. B. A. Antitrust Section* 76 *supra* at pages 92-93, Professor Weston concurs in appellant's belief that the notice provisions of the Ohio Fair Trade Act are outside the exemption of the McGuire Act:

> "There is some doubt whether the Virginia-Ohio type of statute is within the exemption granted by the McGuire Act. The McGuire Act grants its exemption only for 'contracts or agreements' or enforcement of rights of action permitted by state law for selling below prices prescribed in 'such con-

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3. In seeking to create justification for the extensive and unlawful marketing powers retained by the "proprietor," the Ohio Fair Trade Act also resorts to a legal "sleight-of-hand" by way of justification of vertical and horizontal price-fixing. The Act borrows the "property" language of the trade-mark cases preventing interference with the legitimate functions of trade-marks. The Act confers upon the "proprietor" of a trade-mark or trade name a "proprietary interest" in commodities bearing such an identification so long as the commodities retain the markings. Revised Code, Section 1333.31. By reason of this "proprietary interest" the proprietor, who may be a third person designated by the owner of the trade-mark, can compel a remote nonconsenting vendee to adhere to a minimum resale price despite the vendor's sale and receipt of the full purchase price for such commodity.

Having the authority to fix retail prices by notice, the proprietor has the power to take away from the retailer or wholesaler his basic constitutional business freedoms—to buy and resell any products, including Upjohn's in the regular course of commerce; to resell them at the price which he chooses in or out of Ohio; and to conduct his daily

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tracts or agreements.' The Virginia statute provides for 'notice' of the resale price which becomes a 'contract' upon acceptance of the goods with notice. The Ohio statute specifically states that it is lawful for a trademark proprietor to 'establish and control by notice to distributors or by contract' stipulated minimum prices. The Ohio statute would be even more questionable as apparently construed by a minority of its Supreme Court as creating a proprietary interest in the trademark owner in goods that are purchased in another state. Under the doctrine of strict construction of the McGuire Act there is room for argument as to whether these statutes exceed the limited scope of the exemption. For these reasons, H. R. 1253 in the 86th Congress sought to amend the McGuire Act to make it clear that the Virginia and Ohio laws were within the exemption."

business affairs free from the extensive pricing and marketing restraints sought to be imposed by the statute.

The Department of Justice has clearly stated its opinion that the proprietary interest provision of the Quality Stabilization Bill of 1962 (H. J. Res. 636)

> "* * * destroys common law property concepts by enabling a person to sell his property and still maintain significant control over it."

Transcript of Hearings on the Quality Stabilization Bill before a Subcommittee of the House of Representatives Committee on Interstate and Foreign Commerce, 87th Congress, 2nd Session p. 337; testimony of Lee Loevinger, Assistant Attorney General, Antitrust Division, Department of Justice.

The Federal Trade Commission, in commenting upon the proposed Harris Bill of 1959 (H. R. 1253), expressed considerable alarm at a section of the bill closely akin to the "proprietary interest" clauses of the Ohio statute. In its report to the House Committee on Interstate and Foreign Commerce, the Commission stated:

> "The price control permitted to a proprietor by H. R.'s 768 and 1253 would not depend upon any agreement between the proprietor and a distributor, but could be accomplished by unilateral decision and notice by the proprietor. H. R. 1253 would go further by explicitly permitting any manufacturer of branded merchandise to delegate to another person 'the sole authority to establish within the United States stipulated or minimum resale prices' for the manufacturer's merchandise. *This bill would constitute significantly more radical departure from our traditional notions of a free market than any of the previous resale price maintenance exceptions to the antitrust laws contained in the Miller-Tydings or Mc-*

Guire Acts." Report No. 467 to accompany H. R. 1253, pp. 28-29. (Emphasis supplied.)

Concern was also voiced by the Department of Commerce, which made the following observation in its letter to the House Committee on the Harris Bill:

> "Further, it would specifically establish a retention of a proprietary interest by the manufacturer after outright sale of his goods and during a succession of changes of ownership at all levels of trade. *In our opinion this would be a dangerous precedent, contrary to current concepts of property rights.*" Report No. 467 to accompany H. R. 1253, p. 26. (Emphasis supplied.)

The attempt in the Fair Trade Act of 1959 to retain in the proprietor power to determine prices for merchandise after its sale to retailers, possibly through the hands of several middlemen, creates an erroneous inference that somehow sale of the commodity has been incomplete; that a trade-mark is in the nature of a covenant running with the land.

The Fair Trade Act of 1959, within its framework of "contracts by notice" and "proprietary interest" effectively deprives Hudson and other retailers of their basic property rights without due process of law and without just compensation in contravention of the 14th Amendment to the United States Constitution.[5]

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[5] This was the express holding of Judge Leach in *Bulova Watch Co., Inc. v. Ontario Stores of Columbus, Inc.* 86 Ohio L. Abs. 585 at 598:

> "We have not overlooked the contentions of counsel, including the assertion that the 1959 Act has either created or recognized a property right in the commodity *itself* after he has sold it to distributors, so long as the trade-mark or trade name remains thereon. Sec. 1333.31 R. C. *Standing alone, we would doubt the authority of the General Assembly to so create a property right.* But this provision does not stand alone. It is but part of a legislative scheme designed as to

(*Continued on following page*)

4. On October 9, 1961, this Court dismissed an appeal in the case of *The Standard Drug Co., Inc., v. General Electric Co.*, 202 Va. 367, 117 S. E. 2d 289, appeal dis-

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(*Continued from preceding page*)

its end result to compel persons to abide by minimum resale prices established by private persons, not to create property rights as such. In effect, it is but a legislative statement of a reason why it felt it had the power to regulate by such means. In *Union Carbide this same reason was urged upon the Court and rejected.*" (Emphasis supplied.)

The Wyoming Supreme Court held likewise in *Bulova Watch Co. v. Zale Jewelry Co. of Cheyenne*, 1962 C. C. H. Trade Cases, Par. 70,317 at pages 76,277 to 76,278:

"It would seem to be an unjustifiable, untenable and somewhat absurd legal fiction to say that by simply inscribing his trade-mark upon, attaching it to, or accompanying it with an article a producer obtains or retains a divisible and separate title to the trade-mark which does not pass with the marketing and delivery of the commodity itself to the buyer. When a producer elects to identify his product with a trade-mark and launches it into the marts of trade, he has created and sold an entity—a unit—an integrated article—which its purchaser is not required to destroy or deface in order to lawfully market it at a price suitable to him, provided only that he has not offended antidiscrimination laws. If the producer does not want to sell the product bearing his trade-mark, it is his privilege to refrain from so doing. And when he does so identify his product, he is privileged to determine the price which he is willing to accept for it as a trade-marked commodity. He may fix one price for the article with his trade-mark and accept a different price for an identical article not bearing his trade-mark. In either case he sells that which he wants to sell and obtains the price he asks for what he sells. *However, the commodity he sells embodies the entire article, including whatever he has added to it, or placed upon it, or which accompanies it.* He has been paid the full price demanded by him. When such a sale is made, the seller gives into the buyer's possession everything which he has placed upon or with the object of sale. He retains no part of it. If there is any merit at all in the theory of continuing separate identity and ownership of the trade-mark as distinguished from the article itself, a simple answer is that *by affixing to or accompanying with the object of sale the owner's trade-mark, and placing the commodity thus identified upon the market, the producer or distributor has offered and sold all his interest in that portion of his trade-mark which he placed in use upon or with the article sold,* and in so doing has consented to its continued use by all purchasers." (Italics supplied.)

missed 368 U. S. 4. The *Standard Drug* case involved the Virginia Fair Trade Act of 1958.

The Virginia statute is materially different from the Ohio Act, and omits the provisions of the Ohio law which give rise to the substantial Constitutional issues under the Supremacy clause and Due Process clause.

(a) Subsequent to the decision of the *Standard Drug* case, the case of *Bulova Watch Co. v. Zale-Norfolk, Inc. Jewelers Co.*, File No. 2570 was decided in the Court of Law and Chancery, City of Norfolk, Virginia on August 18, 1961. This case held that the "Notice of Minimum Resale Price" provision of the Virginia statute is binding only upon a merchant who, with notice of the price, buys *directly* from the fair-trader.

Where a trade-marked commodity is purchased *directly* from the fair-trading vendor, consent by the purchaser to adhere to the minimum resale price can be reasonably inferred.

In Ohio the notice is binding upon *any purchaser*, direct or remote, of the trademarked goods, and consent to the fair trade price or the lack thereof is entirely immaterial.

(b) The Virginia statute does not contain the horizontal price fixing and restrictive marketing provisions which permeate the Ohio statute.

(c) Nothing in the Virginia statute resembles the provisions of the Ohio Act which create a "proprietary interest" in the trademark owner sufficient to empower him to dictate unilaterally resale prices through the various levels of distribution.

The decision by the Ohio Supreme Court below would create in the proprietor, rights which are far greater than

those now enjoyed by the holder of a patent. In *Sunbeam Corporation v. Wentling*, 192 F. 2d 7 (3rd Cir., 1951), at page 9 the Court stated:

> "A patentee is given a monopoly by legal grant. But even a patentee, who can exclude everyone else from making his patented article, cannot control the price at which others may sell his articles to consumers. The protection given to the owner of a trademark certainly should not be greater than that given to the holder of a legal monopoly, the patentee."

In *United States v. Univis Lens Co.*, 316 U. S. 241, at 250 (1942) the Court held that a patentee could not control the alienability of his commodity after he had sold it. See also *Ethyl Gasoline Corp. v. United States*, 309 U. S. 436 (1940).

A fortiori an owner of a trade-mark cannot do what is forbidden to a patentee. *United States v. Bausch & Lomb Co.*, 321 U. S. 707 (1944).

The Upjohn fair trade program in Ohio, as the record shows, is built upon a dual foundation: on the one hand, a manual of wholesale and retail price lists which becomes a "contract by notice" with each "distributor" by statutory fiat, and on the other, separate forms of wholesale *del credere* agency contracts and retailers' forms of fair trade contracts. By statutory definition in the Ohio Fair Trade Act, both the express and "notice" forms of contracts have the same legal effect. Both draw their life blood from foundations of unlawful horizontal price fixing and illegal restrictive marketing practices. Such contracts, whether express or by notice, are wholly void and unenforcible by the express terms of Section 5(a) (5) of the McGuire Act. By the express mandate of the McGuire Act they may not serve as the bases for action against Hudson.

Between 1949 and the date of the ruling of the Supreme Court of Ohio in the case at bar, the Supreme Courts of 23 states declined to give effect to their respective fair trade laws; four state Supreme Courts held such legislation to be wholly unconstitutional and nineteen rulings declined to give effect to the typical "nonsigner" provisions of state fair trade laws, in the form authorized by the federal enabling legislation, the McGuire Act.

In a last desperate effort to circumvent the trend of judicial decisions, the Ohio Legislature has resorted to a new and sweeping variation of fair trade legislation, which may be constitutionally enacted solely by the Congress. The parallels between the new Ohio legislation and the proposed "fair trade" or "quality stabilization" legislation of the last five years are too obvious for extended comment. The recognition by the Congress that it alone may enact the legislation promulgated by the Ohio Legislature, clearly reveals the violation by the Ohio Fair Trade Act of the Supremacy Clause of the Federal Constitution.

Unless this Court defines the limits beyond which state legislatures may not transgress in reenacting fair trade laws, it is highly probable that these legislatures will yield to the enormous pressure exerted by fair trade proponents and will follow the lead of Ohio. This would open the gates to a flood of new state legislation aimed at overturning major segments of the federal antitrust laws as interpreted by this Court in the *McKesson & Robbins* and *Schwegmann* cases.[6]

[6] Legislation analogous to the Ohio Fair Trade Act was introduced to the New York Legislature in 1962. ("A Proposed New York State Fair Competitive Practices Act," Assembly Bill No. 704 and Senate Bill No. 1652.) The bill passed the Assembly but failed in the Senate. In the current term the Assembly failed to pass the bill.

CONCLUSION.

It is therefore respectfully urged that the questions raised by this appeal are substantial; that the federal issues involved are of great public concern; and that this Court should review the decision of the Supreme Court of Ohio in this case.

Respectfully submitted,

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APPENDIX A.

Opinion of the Court of Common Pleas for Cuyahoga County.

(Case Nos. 727,805 and 730,118.)

Decided July 28, 1960.

McNeill, Judge By Assignment [*In full text*]: These cases, although heard separately by the court, involve the same questions, and will be treated together. The plaintiff is seeking declaratory judgments questioning the constitutionality of the so-called Fair Trade Laws. Defendants, by cross petition, seek to enjoin plaintiff from selling their products at less than the fair trade price. In both cases, the evidence was submitted to the court upon stipulations and upon affidavits and counter-affidavits, it being agreed that such affidavits should be regarded as the testimony of the witnesses as if they were present. No question is raised that the parties are not all properly before the court, and that the court has jurisdiction over the subject matter. There is no dispute that plaintiff, after knowing the fair trade price imposed by defendants, sold the articles at retail for less than said price.

Originally it was held that price fixing under the Fair Trade Act violated the Sherman Anti-Trust Act. An amendment was made thereto granting exception in fair trade cases, and this was held unconstitutional as to non-signers. A further exception to the Sherman Anti-Trust Act was enacted which now permits states to adopt fair trade laws, if they are legal under State constitutions.

In Ohio, the Valentine Act, paralleling the Sherman Act, prohibits the setting of retail prices. The first Fair Trade Act provided an exception, and this was declared unconstitutional by the Supreme Court in the case of *Union Carbide v. Bargain Fair*, 167 O. S. 182 in January,

1958, because of its nonsigner provisions. Thereafter, in 1958, the legislature adopted the new act, R. C. § 1333.27, et seq.

The gist of the new act is that a producer or distributor of any article, or any person designated by either, if the article is trade-marked or given a trade name by either the producer or distributor, has a proprietary interest in the product so long as the commodity is identified by its trade-mark or trade name, and because of such proprietary interest, such producer, distributor or designee may designate a minimum sales price for such product. Anyone they contract with, or anyone else who buys with notice of these terms, even though not directly contracting with such party, as a matter of law is deemed to have agreed not to sell below the minimum sales price, and the remedies of the Act then apply. The minimum sale price may be maintained throughout the whole process of distribution until it reaches the consumer. One other new feature is the provision that if the seller has removed from such commodity all traces of the identifying trade-mark or name, he may then sell it at any price he desires.

This very theory of proprietary interest was argued before the Supreme Court and was discussed at length in their opinion in *Union Carbide, supra,* at page 184, and rejected by the court. Thus, the question arises, does this enactment by the legislature breathe constitutionality into the law that was previously rejected by the Supreme Court?

However, in 16 *C. J. S.* § 71, at page 26, is stated:

> "thus (legislature) may not by means of statutory enactment do indirectly that which it is prohibited from doing directly, by constitutional provison; nor can it do by implication that which it cannot do by express enactment. It is not, however, an illegal

evasion to accomplish a desired result, lawful in itself, by discovering a legal way to do it."

The court is not discussing the economic reasons for the enactment of the statute, so strongly urged in the affidavits, as the court will accept these facts as being true. The legislature, in R. C. § 1333.27 has set forth its reason and purpose, which includes the economic reasons and necessity for enacting the legislation. However, this Court, being a lower court, must necessarily examine the previous case of the Supreme Court, *Union Carbide, supra,* to determine whether any of those evils remain.

It is urged that in considering the constitutionality of the statute that the court must presume its constitutionality, unless it is clearly shown otherwise. However, that presumption does not always prevail.

> "The presumption does not apply, or its operation is given a narrower scope, where the statute shows on its face a violation of constitutional provisions; nor does it apply where such a presumption would defeat constitutional provisions. No presumption of constitutionality attaches to the action of a private group when its action is challenged by a person injuriously affected by it; similarly, when there is a delegation of the legislative power to a private individual who comes in conflict with another private individual of equal standing before the courts, the reason for indulging so strongly in the presumption of constitutionality of the statute involved ceases to exist." 16 C. J. S. § 99, page 408.

This appears to be the law of Ohio. *Belden v. Union Central Life Ins. Co.,* 24 O. O. 151; 143 O. S. 329.

In the *Union Carbide* case, *supra,* one of the grounds for the unconstitutionality of the old act, as stated by the Court, was:

"* * * and in addition, delegates legislative power and discretion to private persons."

There are many differences between the old act and the new act, but is there any material change in this respect?

Under the old act a manufacturer had the right to put a trade-mark on its goods if it desired. This right also ensued to the distributor. If they were trade-marked, they had the right to fair trade or not fair trade the articles. At this point, it would appear there was no undue delegation of authority, as our statutes are replete with instances where persons may decide either to place themselves within certain legislative actions, or not to do so; for example, the mechanic's lien laws. However, in such case, if a person does decide to take advantage of the mechanic's lien law, he then has no other choice, but the law falls and operates on him. This is not true in the fair trade cases, as, in addition to these choices, the producer or distributor has the choice of what price he will set, both for wholesalers and retailers, and after setting the price, he immediately has another choice of changing such fair trade price, or removing it; and even then he may fair trade and set his price again. In this respect, there is no difference between the old law and the present law.

In addition, the new law goes one step further in not only permitting a producer or a distributor from fixing the trade-mark and setting the price, but further provides that this right may be delegated. The new act does provide that a party may remove evidence of the trade-mark or name and then sell the article at any price he desires. This is mainly a paper right, as the proprietor can eliminate this right by making his mark on the merchandise in such a way that it cannot be removed. It may be, and often is, stamped in hard goods, and in many cases is moulded in

each individual pill. If this is done, the right disappears and this is at the option of the proprietor.

There is a long line of decisions in Ohio on delegation of legislative power. Some are helpful and some are not helpful. "Whenever the question is raised, the answer must be found in the language of the act; the attack without regard to extraneous facts." *Belden v. Central Life Insurance Company,* 143 O. S. 329 (Appeal dismissed: 323 U. S. 674).

Section 1, Article 2 of the State Constitution provides:

> "The legislative power of this state shall be vested in the General Assembly * * *."

It is clear the general assembly cannot delegate its legislative power, and any attempt to do so is unconstitutional. See: *Belden v. Insurance Co., supra,* and cases cited therein. In the same case, the Court stated:

> "On the other hand legislative acts granting to a board or an administrative agency quasi-legislative or quasi-judicial power, have been uniformly sustained where the General Assembly has laid down the policy and established the standards while leaving to an administrative agency the making of subordinate rules within prescribed limits and the determination of facts to which the legislative policy is to apply."

There is a much broader rule in reference to delegation of administrative agencies than there is to individuals, the reasons being necessity of government, and the presumption that a public official will properly exercise this power, he having no individual interest in the matter. This is not true with an individual. Defendants argue that Article VIII, Section 2 is the basis for the Act, but this in no way gives a right to delegate legislative power.

The argument is made that since the power to fix prices was available at common law, the Fair Trade Act

only restores this right; and therefore, cannot be a delegation of legislative power. With this argument, the court cannot agree. The act is not to nullify the Valentine Act, but to be an exception to it. The Fair Trade Act only has existence because Congress made such acts an exception to the Sherman Act. Its existence does not stem from a common law right, but it stems as a specific exemption to the Sherman Act, and only has life as it fits the exemption. The Fair Trade Act itself rebuts this argument. The legislature specifically granted a proprietary interest in a trade-mark or name, and gave this right to anyone holding this interest to set minimum prices. This right did not exist at common law to the holder or assignee or designee of a trade-mark or name. He may have the right to set prices generally at common law, but not because of his proprietary interest in his trade-mark. For common law rights of trade-marks generally, see: *U. S. v. Timken*, 83 F. Supp. 284 (at p. 315). This right granted to a holder of a trade-mark is greater than that possessed by the holder of a patent. *U. S. v. Masonite*, 62 S. Ct. R. 1070; 316 U. S. 265. This is a specific legislative enactment that gives a holder of a trade-mark or name a right he did not possess previously. This was clearly denoted in the *Union Carbide* case, *supra*.

The statutes construed by other states have held the right to set a minimum price without reference to any standard is a delegation of legislative power. *Remington Arms Co. v. Skaggs*, 345 P. 2d 1085 (Wash.); *Quality Oil v. E. I. DuPont DeNemours & Co.*, 322 P. 2d 731 (Kans.); *Bissell Carpet Sweeper Co. v. Shane*, 143 N. E. 2d 415 (Ind.); *Olin Mathieson Chemical Corp. v. Francis*, 301 P. 2d 139 (Colo.); *Dr. G. H. Tichenor A. Co. v. Schwegmann Bros.* 90 So. 2d 343 (La.); *General Electric Co. v.*

Wahle, 296 P. 2d 635 (Oregon); *McGraw Electric Co. v. Lewis & Smith Drug Co.*, 68 N. W. 2d 608 (Nebraska).

It is true that the Federal Government and some other states have held this not to be a delegation of legislative authority. The Federal decision is not controlling on the State courts as the Fair Trade Act, as an exception to the Sherman Act, depends upon its being constitutional in each state.

Early in Ohio a general distinction as to what may be delegated was set forth in *Cincinnati Railroad Co. v. Commissioners*, 1 O. S. 77. Grants without guides or standards were made to certain administrative officers. See: *Harmon v. State*, 66 O. S. 340; *Srigley v. Woodworth*, 33 O. A. 406. In *Opdyke v. S. & L. Co.*, 157 O. S. 121, at page 154, the Court stated:

> "In making that grant, the General Assembly has imposed conditions and limitations on the exercise of that power, such as the requirement of compliance with federal law and with regulations of the federal agency concerned with the question of whether a particular Ohio corporation should be permitted to become a federal savings and loan association. The imposition of such conditions and limitations on the exercise of the power so granted does not constitute a delegation of legislative power."

There are different standards in considering whether a delegation of power is proper. This depends on whether the delegation is to an individual or to a quasi government body. In *Weber v. Board of Health*, 148 O. S. 339, the Court, at page 396, stated:

> "Ordinarily, in delegating to boards and commissions the authority to make rules and regulations, the General Assembly must establish the legal policy by adopting standards and authorizing the boards and commissions to make their rules in accordance with

such standards. In the picturesque language of Justice Cardozo in his dissenting opinion in *Panama Refining Co. v. Ryan*, 293 U. S. 388, the power conferred must not be 'unconfined and vagrant' and must be 'canalized within banks that keep it from overflowing.' However, it is recognized that there are many occasions where the nature of the problem makes it impossible to lay down standards, and as a result *rule-making bodies* (Italics this Court's) must be allowed a wide discretion without anything as their guide except the general policy of the law-making body and the law that such bodies must not legislate or make rules which are unreasonable, discriminatory, or contrary to constitutional rights."

In this case, there are no guides or standards, no rules or regulations. The very persons who have the most personal interest in the products are granted the right to set its price. Not being quasi governmental bodies, the presumption that they will operate in the proper public interest does not exist. This certainly is "unconfined and vagrant" and may well overflow the banks.

In *Serrer v. The Cigarette Service Co.*, 148 O. S. 513, the court upheld the general right of the legislature to provide that cigarettes could not be sold below cost, but held the specific act unconstitutional because the formula therein provided did not take sufficient variations into consideration. At Page 522 therein, the Court stated:

> "Although in this day and age it can hardly be urged that legislative bodies in the exercise of the police power may not, in the public interest and in the promotion of economic stability, prohibit sales at below cost, the legislation enacted to accomplish such objects must be so phrased as to recognize economies and practices whereby one seller is able to sell particular merchandise at a lower price than a competitor and still not be chargeable with selling below actual cost."

In this case, there is no formula whatsoever. Certainly if the Supreme Court has held that the legislature by failing to set up a proper formula in dealing with minimum prices acted illegally, a blanket grant of power to a private person to set minimum prices would be without effect.

A recent decision of the Supreme Court, *Remington Arms Co. v. G. E. M. of St. Louis, Inc.*, 102 N. W. 2d 525 touched upon this very problem. At Page 534 therein, the Court stated:

> "In examining the grant of authority to the trade-mark owner it must be conceded that he is given the privilege to place the law in effect and to amend or alter it at his will. He may do this without regard to the interest or welfare of nonsigners or the consumer who represents the public. The law does not provide for any standard or condition as to the necessity for the act. It gives to the trade-mark owner carte blanche authority to make that determination alone. He is not required to consult with anyone. There is no one to review his act."

The Court further states:

> "If we realistically appraise the act for what it is, it should be recognized as a selective price control act which leaves to the manufacturers of trade-mark products the arbitrary right to determine if and when it shall take effect. No standard or yardstick is provided by which such prices are to be determined. It grants to a private party the privilege of creating a right of action for its own benefit or suspending that right at its will. No hearing is provided for to safeguard or protect the unwilling retailer or the consumer. Thus, by virtue of the nonsigner clause the private party in effect may regulate prices as it sees fit. Since one manufacturer and one retailer may fix prices for all retailers, they have the complete power

to fix prices regardless of anyone's interest but their own. * * *"

In the act therein in question, the proprietor of the trade-mark had to enter into a contract with one other person. Under the Ohio Statute, he need contract specifically with no one, only give notice of what price he chooses and then by operation of law, this becomes a part of every contract of sale.

One other question may be raised in reference to delegation of power, which the court is not deciding. The Supreme Court of Oregon, in the case of *General Electric v. Wahle, supra,* held that there is a question whether the legislature itself could set individual fair trade prices for all articles in commerce and place specific prices on each article. The Court held:

> "If the legislature does not have the authority, it certainly cannot give it to anyone else."

No effort is made here to protect the consumer and indirectly the retailer by providing that certain services must be provided; that service personnel must be provided in proportion to the volume of business, as is done with the sellers of new cars or the use of other devices. The problem is very real and needs some solution. However, Fair Trade in Ohio does not appear to be the answer. The Supreme Court, in *Union Carbide, supra,* at Page 186, in giving its reasons for the original acts invalidity stated:

> "* * * in addition, delegates legislative power and discretion to private persons.* * *"

Regardless of any other changes in the act, this delegation of legislative authority remains. This being a lower court, it is bound to follow the dictates of the Supreme Court, and this court does understand this to be its decision.

The court deciding this issue as it has, other questions concerning the act raised in the briefs are not discussed.

Journal Entries prepared and filed this date in accordance herewith.

Judgment of the Court of Common Pleas of Cuyahoga County.

(Dated July 28, 1960.)

(Like Orders filed July 28, 1960, Nos. 727,805 and 730,118.)

This cause came on to be heard upon the pleadings, the evidence, the oral argument of counsel, and upon the briefs submitted by counsel of record and amicus curiae.

The Court finds that it has jurisdiction of the parties hereto, of the subject matter of the action, and that all things have properly been done to bring the subject and all parties before the court.

The Court finds that there has been an enactment in the State of Ohio of R. C. 1333.27-1333.34, inclusive entitled "Fair Trade and Minimum Resale Prices" effective October 22, 1959, and that said act permits a producer or distributor trade-marking or trade-naming an article for retail sale which is in free and open competition with the same general class produced by others and offered for sale in the same general market area, or their designees, to control by notice to distributors, or by contract stipulated minimum resale prices for such commodities; that no standards or limitation of any type is provided to control the discretion of said person setting said price, and that therefore, said act is in violation of Section 1, Article II of the Constitution of the State of Ohio;

That said provisions are an integral and unseparable part of said act and because thereof, R. C. 1333.27-1333.34,

inclusive, are in violation of the Constitution of the State of Ohio, and are of no force and effect; that plaintiff's rights in the sale of its property are affected thereby; and that there is a controversy and judiciable issue before the Court.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that R. C. 1333.27 to R. C. 1333.34, inclusive, of the State of Ohio, are violative of Section 1, Article II of the Constitution of the State of Ohio, and therefore are void and are not binding upon the plaintiff herein. It is further ordered that the cross petition of defendant be, and the same hereby is dismissed, at the costs of the defendant herein. Exceptions allowed.

Signed: EUGENE R. MCNEILL,
Judge by assignment.

Opinion of the Court of Appeals for Cuyahoga County.

(Appeal Nos. 25,371 and 25,374.)

(Decided July 13, 1961.)

SKEEL, J. These appeals come to this Court on questions of law from judgments entered for the plaintiffs, appellees herein, in the Court of Common Pleas of Cuyahoga County. The actions seek a declaratory judgment declaring the Ohio Fair Trade Act invalid and unconstitutional. Both cases involve similar facts and, with the questions to be determined by this Court the same in each case, the appeals will be considered together. The assignment of error is identical in both cases.

> "For its assignment of error, the defendant-appellant asserts that the Court of Common Pleas of Cuyahoga County erred in declaring Sections 1333.27 through 1333.34 of the Ohio Revised Code to be in violation of the Constitution of the State of Ohio, and

therefore void and not binding upon the plaintiff-appellee, and in granting judgment for the plaintiff-appellee on its petition and dismissing the cross-petition of the defendant-appellant."

The plaintiff, in both cases, is the operator of retail stores selling, among other things, pharmaceutical products. The defendant, in each case, is the manufacturer of pharmaceutical items which are distributed to retailers either directly or through wholesalers or jobbers. They do not sell at the retail level. The products manufactured by these defendants for ultimate use and consumption of retail buyers are manufactured and identified under a trademark, trade or brand name, and sold at retail in free and open competition with commodities of the same general class.

These defendants or their distributors have entered into many written contracts with retail pharmaceutical establishments in Ohio, determining the retail resale price for their trademarked or branded commodities and have caused notice of these contracts and the prices therein established to be served on the plaintiff. The defendants, therefore, claim the protection of the Ohio Fair Trade Act. It is alleged in defendants' cross-petitions that the plaintiff, purchasing the defendants' trademarked or trade name or branded products in interstate commerce, with notice of the established retail resale price in Ohio, is continuing to sell such articles (purchased by them after such notice) at retail at cut-rate prices, below the retail price fixed by the defendants, in total disregard of the Fair Trade Act. It is the contention of the plaintiff, among other claims, that the Ohio Fair Trade Act, passed effective October 22, 1959, constitutes a delegation of legislative power to private persons and for that reason is unconstitutional.

The historical background of the Ohio Fair Trade Act began in 1936 upon the passage of what are now known as

Sections 1333.05 to 1333.10, inclusive, of the Revised Code. This legislation followed after the Congress and the Supreme Court of the United States, by successive acts and decisions, dealt with the right of a manufacturer who identified his products by a trade name or trademark to assure the ultimate consumer that such product was manufactured by him, to protect his "goodwill," created by producing quality merchandise as advertised, from the alleged claims of injury to such "goodwill" by price-cutting retailers. There can be no doubt that the buying public is benefited under modern merchandising methods to be able to identify goods either desired or to be avoided by its trade name or trademark. This Court can take notice of the complete change in merchandising methods over the past seventy-five years. From cracker barrel days when manufacturers found their markets in the locality of their business or sales were made to the ultimate consumer through the retailer's reputation, the retailer in turn being the object of the sales activity of manufacturers or wholesalers, to the present period when the manufacturer points his sales activities to attract the attention of the consuming public and the retailer prepares his stock to meet the demands of the buying public as influenced by the direct advertising of the manufacturer, it must follow that the manufacturer's goodwill is an important and valuable factor in the retail market of today. The manufacturer or wholesale distributor, in seeking to attract the public to buy his products, uses his distinctive trademark or trade name by which his goods are identified. So completely have the processes of merchandising consumer goods changed that the Supreme Court of Ohio held in the case of *Rogers v. Toni Home Permanent Co.* (1958), 167 Ohio St., 244, that an action claiming a breach of an express warranty could be maintained against

the manufacturer without privity of contract, that is where the goods were purchased by the consumer from an independent retailer, the buyer (consumer) being induced to buy the manufacturer's product through the manufacturer's direct advertising and consumer sales efforts. On page 248, the court said:

"Occasions may arise when it is fitting and wholesome to discard legal concepts of the past to meet new conditions and practices of our changing and progressing civilization. Today, many manufacturers of merchandise, including the defendant herein, make extensive use of newspapers, periodicals, signboards, radio and television to advertise their products. The worth, quality and benefits of these products are described in glowing terms and in considerable detail, and the appeal is almost universally directed to the ultimate consumer. Many of these manufactured articles are shipped out in sealed containers by the manufacturer, and the retailers who dispense them to the ultimate consumers are but conduits or outlets through which the manufacturer distributes his goods. The consuming public ordinarily relies exclusively on the representations of the manufacturer in his advertisements. What sensible or sound reason then exists as to why, when the goods purchased by the ultimate consumer on the strength of the advertisements aimed squarely at him do not possess their described qualities and goodness and cause him harm, he should not be permitted to move against the manufacturer to recoup his loss. In our minds no good or valid reason exists for denying him that right. Surely under modern merchandising practices the manufacturer owes a very real obligation toward those who consume or use his products. The warranties made by the manufacturer in his advertisements and by the labels on his products are inducements to the ultimate consumers, and the manufacturer ought to be held to strict accountability to any consumer who buys the product

in reliance on such representations and later suffers injury because the product proves to be defective or deleterious. See Prosser on Torts (2 Ed.), 506, Section 84; 1 Williston on Sales (Rev. Ed.), 648 to 650, Section 244a."

The liability of the manufacturer would be the same even though his goods were purchased from a price-cutter to his claimed detriment. It would be unusual that modern trends in retail merchandising should thus create a direct liability against a manufacturer for breach of warranty in the representations inducing the sale of his goods made by the manufacturer, the sale being made by an independent retailer, and then to refuse such manufacturer the right to protect his property right in his goodwill, the representations which created the inducing cause of the sale, from damages to such property right by the acts of the retailer selling his goods at cut-rate price in violation of the fair-trade price set on the basis of a contract under the Fair Trade Act.

It is the claim of those supporting "Fair Trade" legislation that the goodwill of the manufacturer created by his direct sales efforts, and in maintaining goodwill by the quality of his products, whereby the consuming public seeks out his goods without any sales effort on the part of the retailer whose only part in the transaction is to have the goods available for sale at the selection of the consumer purchaser, is damaged and his product depreciated by retail price-cutting practices.

In an attempt to protect the value of a manufacturer's goodwill, established by his sales efforts (in support of the quality of his product) in relation to his trademarked goods, from the claimed detriment of price-cutting retailers, both the Legislatures of the several states and the Congress of the United States, beginning at about the

turn of the century, have been attempting to provide regulations to protect the manufacturer's property right in his goodwill from detriment due to the uncontrolled action of price-cutting retailers. The basis of these efforts has been to provide by law the conduct between the manufacturer and the retailer acquiring the goods for resale that will create contractual relations between them by which a minimum retail sales price can be established.

The cases on contracts between manufacturer and retailers, whereby the retailer agrees to maintain a retail price set by the owner of trademarked or trade-named goods by which the manufacturer's goods are identified and who, over the years, has, by expending time and capital, developed what is called "goodwill" in relation to his product, these contracts being identified and characterized as supporting "fair trade," have been upheld as between the parties at common law.

However, after the passage of the "Sherman Act" by the Congress of the United States in 1890, the Supreme Court of the United States in *Dr. Miles Medical Co. v. John D. Parks & Sons Co.*, 220 U. S., 373, 55 L. Ed., 502, 31 S. Ct., 376, held that a contract controlling the resale price between a manufacturer and a retail dealer with regard to goods in interstate commerce constituted a violation of the Sherman Act. The results of this case for a time ended legislative attempts to provide against unfair trade practices alleged to result from price cutting.

A reading of the opinion of Mr. Justice Hughes in the *Dr. Miles Medical Co.* case, which was decided in 1911, makes it clear that the only question decided dealt with contracts in restraint of trade in interstate commerce under the Sherman Act. The Dr. Miles Medical Company, the manufacturer of a non-patented, secret formula remedy, attempted to control the price of its products, both

at retail and wholesale, by two forms of restrictive agreements limiting trade in the products of Dr. Miles to those who became parties to either of such contracts. One contract was a consignment entered into with wholesalers, the other was a retail agency contract made with retail dealers throughout the United States. The defendant was a wholesale drug concern that refused to enter into the required contract but procured Dr. Miles' products for sale at cut-rate prices by inducing those having contractual relations with Dr. Miles to breach their contracts. One question presented was the validity of the consignment contract between Dr. Miles and certain jobbers. This question was not clearly considered because the allegations of the complaint as to the manner in which defendant procured the goods were not set out. The complainant relied on two claims, the first being that its product was an article created under a secret process of which the manufacturer was the owner. This claim was held without legal foundation to protect a contract controlling retail prices, under the Sherman Act. The court said that the question concerns not the process of manufacture but rather an article in commerce. The complainant, the court said, could not rely on the protection afforded a patentee derived by a statutory grant. The second claim was that the complainant was entitled to maintain the restrictions by virtue of the fact that the restrictions related to products of its own manufacture. Ordinarily, there is no way to impose restraints on goods after alienation, with one or two recognized exceptions that are not important here. Such claims are void because the seller parted with its whole interest in the property sold to the vendee by the sale. The basis of the decision is that where the manufacturer or jobber attempts to fix a minimum retail price, the result would be to completely

foreclose the free and unrestricted competition between retailers, who are, in fact, the owners of the goods. The court said, at page 405:

> "Whatever right the manufacturer may have to project his control beyond his own sales must depend, not upon an inherent power incident to production and original ownership, but upon agreement."

The court said that contracts in restraint of trade must be considered in the light of commercial needs at the time such contract is made. On page 406 of the opinion, the following, applicable here, appears:

> "* * * As was said by this court in *Gibbs v. Baltimore Gas Co.*, 130 U. S., p. 409, 'The decision in *Mitchel v. Reynolds*, 1 P. Wms., 181; S. C., Smith's Leading Cases, 407, 7th Eng. ed; 8th Am. ed. 756, is the foundation of the rule in relation to the invalidity of contracts in restraint of trade; but as it was made under a condition of things and a state of society, different from those which now prevail, the rule laid down is not regarded as inflexible, and has been considerably modified. Public welfare is first considered, and if it be not involved and the restraint upon one party is not greater than protection to the other party requires, the contract may be sustained. The question is, whether, under the particular circumstances of the case and the nature of the particular contract involved in it, the contract is, or is not unreasonable. * * *'
>
> "* * * But there are exceptions: restraints of trade and interference with individual liberty of action may be justified by the special circumstances of a particular case. It is a sufficient justification, and indeed it is the only justification, if the restriction is reasonable—reasonable, that is, in reference to the interests of the parties concerned and reasonable in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the

party in whose favor it is imposed, while at the same time it is in no way injurious to the public."

This view of the law was expressed at a time when trademarks or trade names were not the labels by which the public was induced to select a manufacturer's product because of his direct advertisements and sales efforts, but at a time when the usual action concerning trade names had to do with attempts to fraudently use the labels or trademarks of another. Mr. Justice Oliver Wendell Holmes, in a strong dissenting opinion, suggests that by the slightest change the contract could not be attacked. He states the following:

"* * * If it should make the retail dealers also agents in law as well as in name and retain the title until the goods left their hands I cannot conceive that even the present enthusiasm for regulating the prices to be charged by other people would deny that the owner was acting within his rights. It seems to me that this consideration by itself ought to give us pause.

"But I go farther. There is no statute covering the case; there is no body of precedent that by ineluctable logic requires the conclusion to which the court has come. The conclusion is reached by extending a certain conception of public policy to a new sphere. On such matters we are in perilous country. I think that, at least, it is safe to say that the most enlightened judicial policy is to let people manage their own business in their own way, unless the ground for interferences is very clear. * * *"

And on page 412, Mr. Justice Holmes said:

"* * * I think that we greatly exaggerate the value and importance to the public of competition in the production or distribution of an article (here it is only distribution), as fixing a fair price. What really fixes that is the competition of the conflicting desires. * * * As soon as the price of something that we

want goes above the point at which we are willing to give up other things to have that, we cease to buy it and buy something else. * * * The Dr. Miles Medical Company knows better than we do what will enable it to do the best business. We must assume its retail price to be reasonable, for it is so alleged and the case is here on demurrer; so I see nothing to warrant my assuming that the public will not be served best by the company being allowed to carry out its plan. I cannot believe that in the long run the public will profit by this court permitting knaves to cut reasonable prices for some ulterior purpose of their own and thus to impair, if not to destroy, the production and sale of articles which it is assumed to be desirable that the public should be able to get."

After the *Dr. Miles* case, no attempt seems to have been made to legislate on the question of sanctioning by law agreements coming within the oribt of statutes designated as "Fair Trade Laws" until 1931 when California passed as a part of the Business and Professions Code, Sections,16900 to 16905, inclusive. Section 16902 is similar in context, and in purpose identical, to Section 1333.06 and Section 1333.07, Revised Code, a part of the Ohio Fair Trade Act of 1936.

These sections containing the non-signer clause have been held constitutional in a number of cases in California. *Max Factor & Co. v. Kunsman* (1936), 5 Cal. (2d), 446, 55 P. (2d), 177; *Scovill Mfg. Co. v. Skaggs Pay Less Drug Stores* (1955), 45 Cal. (2d), 881, 291 P. (2d), 936.

The *Factor* case was affirmed on appeal to the United States Supreme Court in 299 U. S., 198, 81 L. Ed., 122, 57 S. Ct., 147, in an opinion by Mr. Justice Sutherland, relying on the *Old Dearborn* case, *infra*.

The Illinois Fair Trade Act of 1935 (Smith-Hurd Rev. Statutes, 121½, paragraph 188 *et seq.*), which in substance

is identical with the Ohio Act of 1936, including the non-signer provision, was challenged in the case of *Old Dearborn Distributing Co. v. Seagram-Distillers Corp.* (1936), 299 U. S., 183, 81 L. Ed., 109, 57 S. Ct., 139, 106 A. L. R., 1476, on the ground that it constituted an unlawful delegation of legislative power and denied equal protection of the laws. Paragraphs 1, 2, and 3 of the headnotes of the Lawyer's Edition report of such case provide as follows:

"1. Property is not taken without due process, in violation of the Fourteenth Amendment, by a state statute which declares that wilfully and knowingly advertising, offering for sale, or selling any commodity at less than the price stipulated in any contract entered into between persons handling a commodity bearing the trademark, brand or name of the producer or owner and which is in fair and open competition with commodities of the same general class produced by others, for the maintenance of a fixed resale price, whether the person so advertising, offering for sale, or selling is or is not a party to such contract, is unfair competition and actionable at the suit of any person damaged thereby, there being nothing in the act to preclude a purchaser from removing the mark or brand from the commodity and then selling it at his own price.

"2. Legislative power is not unconstitutionally delegated by a statute which permits sellers of commodities bearing the trademark, brand or name of the producer or owner to contract with the purchaser for the maintenance of a fixed resale price, and provides that wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract thus entered into, whether the person so advertising, offering for sale or selling is or is not a party thereto, shall be unfair competition and actionable at the suit of any person damaged thereby.

"3. The question whether price cutting by retail dealers in the case of commodities bearing the trade-mark, brand or name of the producer or owner is injurious to the general public is one as to which the legislature's determination is conclusive on the courts."

On pages 194, 195 and 196 of 299 U. S., the court said:

"We find nothing in this situation to justify the contention that there is an unlawful delegation of power to private persons to control the disposition of the property of others, such as was condemned in *Eubank v. Richmond*, 226 U. S., 137, 143; *Seattle Trust Co. v. Roberge*, 278 U. S., 116, 121, 122; and *Carter v. Carter Coal Co.*, 298 U. S., 238, 311. In those cases the property affected had been acquired without any pre-existing restriction in respect of its use or disposition. The imposition of the restriction *in invitum* was authorized after complete and unrestricted ownership had vested in the persons affected. Here, the restriction, already imposed with the knowledge of appellants, ran with the acquisition and conditioned it.

"Nor is Section 2 so arbitrary, unfair or wanting in reason as to result in a denial of due process. We are here dealing not with a commodity alone, but with a commodity plus the brand or trade-mark which it bears as evidence of its origin and of the quality of the commodity for which the brand or trademark stands. Appellants own the commodity; they do not own the mark or the good will that the mark symbolizes. And good will is property in a very real sense, injury to which, like injury to any other species of property, is a proper subject for legislation. Good will is a valuable contributing aid to business—sometimes the most valuable contributing asset of the producer or distributor of commodities. And distinctive trade-marks, labels and brands, are legitimate aids to the creation or enlargement of such

good will. It is well settled that the proprietor of the good will 'is entitled to protection as against one who attempts to deprive him of the benefits resulting from the same, by using his labels and trade-mark without his consent and authority.' *McLean v. Fleming*, 96 U. S., 245, 252. 'Courts afford redress or relief upon the ground that a party has a valuable interest in the good will of his trade or business, and in the trade-marks adopted to maintain and extend it.' *Hanover Milling Co. v. Metcalf*, 240 U. S., 403, 412. The ownership of the good will, we repeat, remains unchanged, notwithstanding the commodity has been parted with. Section 2 of the act does not prevent a purchaser of the commodity bearing the mark from selling the commodity alone at any price he pleases. It interferes only when he sells with the aid of the good will of the vendor; and it interferes then only to protect that good will against injury. It proceeds upon the theory that the sale of identified goods at less than the price fixed by the owner of the mark or brand is an assault upon the goodwill, and constitutes what the statute denominates 'unfair competition.' See *Liberty Warehouse Co. v. Burley Tobacco Growers' Assn.*, 276 U. S., 71, 91-92, 96-97. There is nothing in the act to preclude the purchaser from removing the mark or brand from the commodity—thus separating the physical property, which he owns, from the good will, which is the property of another—and then selling the commodity at his own price, provided he can do so without utilizing the good will of the latter as an aid to that end.

"There is a great body of fact and opinion tending to show that price cutting by retail dealers is not only injurious to the good will and business of the producer and distributor of identified goods, but injurious to the general public as well. The evidence to that effect is voluminous; but it would serve no useful purpose to review the evidence or to enlarge further upon the

subject. True, there is evidence, opinion and argument to the contrary; but it does not concern us to determine where the weight lies. We need say no more than that the question may be regarded as fairly open to differences of opinion."

Following that decision, the Congress of the United States passed the Miller-Tydings Act (15 U. S. Code Section 1) which amended the Sherman Act, providing that "fair trade" contracts in interstate commerce do not constitute a violation of any provision of that act. That act was interpreted by the Supreme Court of the United States in the case of *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U. S., 384, 95 L. Ed., 1034, 71 S. Ct., 745, 19 A. L. R. (2d), 1119, where the court held in the syllabus:

> "a) Price fixing is unlawful *per se* under the Sherman Act.
>
> "b) The Miller-Tydings Act exempts 'contracts or agreements prescribing minimum prices for the resale' of the articles purchased, not 'contracts or agreements' respecting the practices of noncontracting competitors of the contracting retailers.
>
> "c) The history of the Miller-Tydings Act supports the construction here given it."

A complete history of the fate of "Fair Trade" statutes and cases, beginning with the *Dr. Miles* case, is set out in an attempt to explain why non-signer provisions of "fair trade" laws were not exempted from the Sherman Act. The opinion was by Mr. Justice Douglas, with a concurring opinion by Mr. Justice Jackson in which Mr. Justice Minton concurred. Mr. Justice Frankfurter, with whom Mr. Justice Black and Mr. Justice Burton joined, wrote a strong dissenting opinion in which they said that it was the intention of Congress to include the non-signer clause of a fair trade law as exempt from the terms of the Sherman Act. On page 398, Mr. Justice Frankfurter said:

"The setting of the Miller-Tydings Amendment and its legislative history remove any lingering doubts. The depression following 1929 gave impetus to the movement for legislation which would allow the fixing of minimum resale prices. In 1931, California passed a statute allowing a manufacturer to establish resale prices binding only upon retailers who voluntarily entered into a contract with him. This proved completely ineffective, and in 1933 California amended her statute to provide that such a contract established a minimum price binding upon any person who had notice of the contract. Grether, Experience in California with Fair Trade Legislation Restricting Price Cutting, 24 Calif. L. Rev., 640, 644 (1936). This amendment was the so-called 'non-signer' clause which, in effect, allowed a manufacturer or wholesaler to fix a minimum resale price for his product. Every 'fair trade' law thereafter passed by any state contained this 'non-signer' clause. By the close of 1936, 14 states had passed such laws. In 1937, 28 more states passed them. Today, 45 out of 48 states have 'fair trade' laws. See Report of the Federal Trade Commission on Resale Price Maintenance XXVII (Dec. 13, 1945).

"A substantial obstacle remained in the path of the 'fair trade' movement. In 1911, we had decided *Dr. Miles Medical Co. v. Park & Sons Co.*, 220 U. S., 373. There, in a suit brought against a 'non-signer,' we held that an agreement to maintain resale prices was a 'contract * * * in restraint of trade' which was contrary to the Sherman Law. To remove this block, the Miller-Tydings Amendment was enacted. It is said, however, that thereby Congress meant only to remove the bar of the Sherman Law from agreements between the manufacturer and retailer, that Congress did not mean to make valid the 'non-signer' clause which formed an integral part of each of the 42 state statutes in effect when the Amendment was passed."

And on page 401, in the dissenting opinion, the following appears:

> "Every one of the 42 state acts which the Miller-Tydings Amendment was to 'back up'—the acts on which the Miller-Tydings Amendment was to place a 'stamp of approval'—contained a 'non-signer' provision. As demonstrated by experience in California, the state acts would have been futile without the 'non-signer' clause. The court now holds that the Miller-Tydings Amendment does not cover these 'non-signer' provisions. Not only is the view of the court contrary to the words of the statute and to the legislative history."

That case was decided May 21, 1951. Congress almost immediately (1952) passed the McGuire Act, 15 U. S. Code, Section 45. Paragraphs 2 and 3 thereof provide:

> "(2). Nothing contained in this section or in any of the Antitrust Acts shall render unlawful any contracts or agreements prescribing minimum or stipulated prices, or requiring a vendee to enter into contracts or agreements prescribing minimum or stipulated prices, for the resale of a commodity which bears, or the label or container of which bears, the trade-mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions under any statute, law, or public policy now or hereafter in effect in any state, territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale.
>
> "(3). Nothing contained in this section or in any of the Antitrust Acts shall render unlawful the exercise or the enforcement of any right or right of action created by any statute, law, or public policy now or

hereafter in effect in any state, territory, or the District of Columbia, which in substance provides that willfully and knowingly advertising, offering for sale, or selling any commodity at less than the price or prices prescribed in such contracts or agreements whether the person so advertising, offering for sale, or selling is or is not a party to such a contract or agreement, is unfair competition and is actionable at the suit of any person damaged thereby."

The purpose of the McGuire Act was stated as follows:

"That it is the purpose of this Act to protect the rights of states under the United States Constitution to regulate their internal affairs and more particularly to enact statutes and laws, and to adopt policies, which authorize contracts and agreements prescribing minimum or stipulated prices for the resale of commodities and to extend the minimum or stipulated prices prescribed by such contracts and agreements to persons who are not parties thereto. It is the further purpose of this Act to permit such statutes, laws, and public policies to apply to commodities, contracts, agreements, and activities in or affecting interstate or foreign commerce."

According to its sponsor, Representative McGuire:

"The McGuire bill is merely permissive. It says to the States, in effect, that Congress recognizes the rights of the States to enact and make effective policies respecting unfair competition. That is all the McGuire bill does and that is all it is intended to do. 98 Cong. Rec., 4979 (May 7, 1952).

"The primary purpose of the McGuire Act was to change, as to future cases, the result reached by the Supreme Court in *Schwegmann Brothers v. Calvert Distillers Corp.*, 341 U. S., 384, 71 S. Ct., 745, 95 L. Ed., 1035 * * *. H. R. Rep. 1437, 82nd Congress, 2nd Session, pp. 1-2, U. S. Code. Congressional and Administrative News 1952, pp. 2181, 2182."

The McGuire Act was almost immediately brought before the court in an action to enjoin a supermarket operator from selling a manufacturer's trademarked product below the minimum retail sale price fixed under the Louisiana Fair Trade Act. *Schwegmann Bros. Giant Super Markets v. Eli Lilly & Co.*, 205 F. (2d), 788. This case was presented on stipulations of fact, so that the issues of both the constitutionality of the McGuire Act and of the nonsigner provisions of the Louisiana Fair Trade Act were clearly presented. The court held that both acts were not subject to the appellant's claims of unconstitutionality. The headnotes provide:

"1. Question whether distributors were to be protected under fair trade laws, as well as manufacturers or trade-mark owners, is matter addressed to legislative discretion and not subject to court review. * * *

"2. Right of property owner to fix price at which he will sell is an inherent attribute of property itself and, as such, is within protection of due process clauses of federal Constitution. * * *

"3. In enacting fair trade law, it was within legislative province to assume that economic laws would constitute sufficient restraint against capricious or arbitrary price fixing by producer. * * *

"4. Congressional power over interstate commerce is so plenary that Congress may exercise that power by permitting states to regulate phases of interstate commerce.

"5. Under Louisiana Fair Trade Law and federal statute removing ban of federal antitrust laws from price agreements made under state or territorial fair trade acts of designated type, Congress and Legislature intended that restrictions on nonsigners, when imposed as result of contract between producer and distributor, would be given effect. * * *

"6. Where state and federal statutes prohibit horizontal price fixing agreements between manufac-

turers, between producers, between wholesalers, between brokers, between factors, between retailers, or between persons, firms or corporations in competition with each other, making such statutes operative against nonsigners would not make terms of such statutes self-defeating or contradictory. * * *

"7. Louisiana Fair Trade Law and federal statute removing ban on federal antitrust laws from price agreements made under state or territorial fair trade acts of designated type are not violators of due process clauses of federal Constitution on grounds of lack of substantial relation to public welfare and delegation of legislative power to private individuals. * * *"

The Supreme Court of the United States refused certiorari, 346 U. S., 856.

The state of Virginia passed a fair trade act which, by subsequent amendment, contained a non-signer clause. In *Benrus Watch Co., Inc., v. Kirsch*, 198 Va., 94, 92 S. E. (2d), 384, this provision was the subject of an action in which its constitutionality was challenged. The trial court came to the conclusion, along with other reasons for striking down this clause, that the non-signer provision was unconstitutional; but, upon appeal, the Supreme Court of Appeals held that the fair trade act had been repealed by implication by the passage of the "Anti-Monopoly Act of 1950." A new "fair trade act" was passed in 1958. Its provisions were immediately tested in the case of *Standard Drug Co., Inc., v. General Electric Co.*, 202 Va., 367, 117 S. E. (2d), 289. The new act did not contain the so-called "coercive non-signer" provision, but in its stead incorporated a provision that the Supreme Court of Appeals designated as a "permissively contractual provision." While the facts stipulated in the pleadings show that the Standard Drug Company bought the flashbulbs directly from General Electric, there was no direct contract controlling the resale price to others. Standard, however, had

direct notice before the purchase of the bulbs that General Electric was "fair trading" its flashbulbs in Virginia, and it also had notice of the required resale price under the Fair Trade Act. The headnotes of the case, reported in 117 S. E. (2d), 289, in part, provide:

"1. Where retailer contracted directly with manufacturer of trademarked flashbulbs, and, when purchase was made, retailer by expressed terms of contract agreed not to resell at less than specified minimum prices, retailer could not justly complain, in proceeding for declaratory judgment, that Fair Trade Act is unconstitutional, because retailer was not free to use and impair the goodwill of the manufacturer by selling flashbulbs at a price less than retailer agreed to maintain. * * *

"* * *

"3. The Fair Trade Act, which does not contain a 'non-signer' provision, does not violate the equal protection clause of the Fourteenth Amendment to the federal Constitution. * * *

"* * *

"5. The Fair Trade Act, which does not contain a 'non-signer' provision, does not violate constitutional provision that the legislative power shall be vested in a General Assembly, on ground that it delegates legislative power to private persons. * * *

"6. 'Goodwill' of manufacturer or producer is that intangible property right or asset created in public mind by skill, experience, dependability, and integrity of manufacturer or producer of a commodity, and trade-mark or trade name is the symbol of those qualities and constitutes an inseparable part of the 'goodwill.'

"7. The owner or proprietor of goodwill symbolized by his trade-mark is entitled to protection in his property right, and commodities bearing and identified by trademark, brand, or name of producer or

distributor and in free and open competition with commodities of same general class are proper subjects of legislative classification.

"8. The Fair Trade Act does not violate provision of the Constitution that the General Assembly shall not enact any local, special, or private law granting to any private corporation, association, or individual any special or exclusive right, privilege, or immunity. * * *

"9. Title of Fair Trade Act stating that it is an act to permit any producer or distributor to prescribe minimum resale prices of a commodity bearing trademark, brand, or name of producer or distributor if commodity is in free and open competition with commodities of the same class does not violate section of the Constitution declaring that no law shall embrace more than one subject which shall be expressed in its title. * * *

"* * *

"13. In determining the meaning of a 'contract' under the Fair Trade Act, Supreme Court of Appeals was not limited to single sentence in act defining a 'contract' but could and should look to other pertinent and explanatory parts of the act. * * *

"14. Acceptance by retailer of commodity for resale with notice attached stating its minimum retail price gives rise to a 'contract' under the Fair Trade Act, and therefore the Fair Trade Act is not in conflict with the Sherman Anti-Trust Act and void, on ground that the Fair Trade Act is in restraint of trade by authorizing price-fixing without a contract. * * *"

That case clearly holds that the Legislature may define the elements of an implied contract as coming about by conduct with knowledge of the facts upon which the agreement is based. No power to fix prices is to be found under the facts of that case, nor do the provisions of the act delegate such power to another. If the retailer does not

care to buy the manufacturer's goods on the terms the manufacturer desires to sell them, or if upon buying goods that have been "Fair-Traded" and the price fixed for resale is made known to the buyer before purchase and he does not want the goods under the conditions stipulated, there is no reason which compels the buyer to enter into a contract to buy, but if he does, he must take the goods upon the terms of the offer. Such a transaction involves the law of contracts. The retailer acts voluntarily and is not otherwise compelled to deal for or take the goods, it, of course, being a part of the provisions of the act that the goods be identified by trademark or trade name and on the market in free and open competition with goods distributed by others in the same general class.

The Supreme Court of Appeals of Virginia resolved all questions of the constitutionality of the new Fair Trade Act of Virginia in favor of the validity of the statute and affirmed the trial court in its decree enjoining Standard from violating the resale price of flash bulbs fixed under the rules of the Virginia Fair Trade Act on the theory of implied contract. This is the only case of a state court of last resort that has considered the constitutionality of a statute identical in purpose to that of the new Fair Trade Act of Ohio. All the other cases cited by the parties concerned non-signer clauses, in purposes similar to that in the former Ohio Fair Trade Act.

With the foregoing background of "fair trade" legislation and the leading cases dealing with the legislative efforts to curb "retail price cutting" of trademarked or tradenamed goods sold in open competition with goods of the same general class, it must be perfectly evident that not only the great majority of state legislatures but also the Congress of the United States have determined that there is need to provide reasonable controls in this field, under

the police powers of the sovereign power. The reasons pro and con, either for or against, such legislation, are set out in great detail by the records of the hearings before the Judiciary Committees of both the House and Senate of the Ohio Legislature when considering the Fair Trade Act passed effective October 22, 1959, over the veto of the Governor by overwhelming majorities in both houses (Sections 1333.27 to 1333.34, inclusive, of the Revised Code). Whether such legislation is desirable is within the sound discretion of the Legislature, about which the courts should not be concerned except to see to it that constitutional limitations are observed and, in case of doubt such doubts should be resolved in favor of the acts of the Legislature.

Without attempting to set out in detail the arguments for or against "fair trade" laws, which now would serve no useful purpose, it might be well just to mention that those against "fair trade" legislation argue that the public is entitled to the benefit of the economies enjoyed by savings in purchasing goods at lower prices from cut-rate establishments, while, on the other hand, the proponents assert that the need to save the local small merchant, who not only sells merchandise in competition with all others but also renders service, is absolutely essential in many cases to the health and welfare of the community. It is claimed that price-cutting survives on the desire of the public to purchase known brands, this desire having been created by the manufacturer's sales efforts on the consumer level. In other words, the price-cutter capitalizes on the goodwill of the manufacturer. The claim that fixing retail prices by the manufacturer under the Fair Trade Act deprives the consumer of the benefits of competition is met by the claim that his goods must be sold in competition with other goods of the same class

under Fair Trade Acts, which fact assures the public of all reasonable benefits of competition. However, as just stated, this is a question of fact for legislative determination. The Legislature, in adopting the Fair Trade Act of 1959, defined the purpose and policy of the Act in Section 1333.27, Revised Code, as follows:

"(A) Sections 1333.27 to 1333.34, inclusive, of the Revised Code are enacted in the exercise of the police powers of the state and in pursuance of the power specifically granted the General Assembly by the people in Section 2 of Article XIII, Ohio Constitution, to regulate the sale and conveyance of personal property, and the purposes of Sections 1333.27 to 1333.34, inclusive, of the Revised Code, are generally to protect and preserve small business, to safeguard the goodwill of trademarks and trade names, to further wholesome competition, to prevent monopoly in the distribution of goods, and to promote the public welfare by securing wider distribution of commodities and an increase in the production thereof, and thereby reducing production and distribution costs, protecting and increasing gainful employment in manufacturing, wholesaling and retailing, all for the benefit of the consumer and the well-being of the citizens of the state.

"(B) It is the further purpose of Sections 1333.27 to 1333.34, inclusive, of the Revised Code, to promote the distribution in commerce in the state of identified merchandise which is in free and open competition with other articles of the same general class. Where fair, equitable, and competitive prices cannot be maintained in all appropriate stages in the distribution of such identified merchandise, the marketing of such merchandise is depressed and the quantity thereof moving in the channels of commerce in the state declines.

"(C) To remove obstructions to the marketing of identified merchandise in commerce which are oc-

casioned by unfair selling practices, it is the policy of the state to afford distributors of identified merchandise an effective means whereby the sale of such merchandise at all appropriate stages of distribution may be consummated at prices adequate to stimulate distribution and low enough to enable distributors of such identified merchandise to compete effectively with those marketing other goods, who by size and dominance may distribute such goods through their own retail outlets or by franchise or consignment methods, and to satisfy the needs of ultimate consumers."

As was stated, the first "Fair Trade Act" was passed in Ohio in 1936 at about the time of the decision of the United States Supreme Court in the *Old Dearborn* case. The first Ohio Fair Trade Act contained the so-called "non-signer" provisions. The act was challenged in 1956 in the case of *Union Carbide & Carbon Corp. v. Bargain Fair, Inc.*, 167 Ohio St., 182, which was decided January 22, 1958. It should be noted that on page 185 of the opinion, Judge Zimmerman lists some of the states where a fair trade act, including a non-signer clause, had been upheld in its entirety and a few states where the courts had come to the opposite conclusion. The date of the decision is mentioned because, after it was published, holding the non-signer provision unconstitutional as a delegation of legislative power, the Legislature, in the 103rd General Assembly, enacted Sections 1333.27 to 1333.34, inclusive, Revised Code, and in the process did not readopt the non-signer clause but, in its place, followed and somewhat enlarged on the provisions of the Virginia Act setting out the circumstances under which a buyer for wholesale or retail purposes would be bound to maintain "fair trade contracts" with the manufacturer from whom the goods were purchased as provided by the Act. This is accom-

plished by fixing fair-trade prices by contracts with other retailers, with notice of such prices to the retailer involved, and the retailer then purchasing such articles for resale on the retail market with knowledge that under the law he has impliedly contracted to maintain fair-trade prices by the purchase of goods for resale under such circumstances. The goods, of course, must bear the trademark or trade name of the manufacturer or producer and be sold in competition with other goods of the same class. These provisions of the new act were not in issue before the Supreme Court in the *Bargain Fair* case, and, therefore, that case is not in point on the issues in these cases.

The legislative purpose in passing the "Fair Trade Act" of 1959 was to override the decision of the Supreme Court in the *Bargain Fair* case. The Legislature studiously sought to pass an Act meeting every constitutional objection pronounced by the Supreme Court in "*Bargain Fair.*" There is no purpose in any of the "fair trade" legislation to control prices collaterally. This is clearly shown by the true basic theory of the new acts of Virginia and Ohio. Here, whatever may be said of other fair trade acts, this legislation in Ohio (Sections 1333.27 to 1333.34, inclusive, of the Revised Code) provides the conduct that will create a contract controlling resale prices by the retailer whose conduct in the purchase of the goods comes within the terms of the statute. The Legislature has passed legislation of like character which has been upheld by the courts, such as defining the seller's rights under a conditional sales contract. That such a matter is subject to legislative control cannot be questioned since the Act was passed to prevent the injurious effect of price cutting to the manufacturer's goodwill (found to be a fact by the Legislature) of his trademarked or trade-named goods sold in open competition on the market with like goods sold by

others. The benefit to the retailer of trademarked goods is that created by the manufacturer's goodwill, inducing the ultimate purchaser to seek out the goods.

There can be no question that the seller of personal property, when he parts with title, parts with ownership in the goods, unless by the sales contract, either express, implied or by obligation imposed by law, the buyer agrees or assents to be bound to a particular course of conduct with respect thereto. If so, his obligation is because of a contract, not because of a limitation imposed upon the goods. The manufacturer or distributor of goods, by reason of his own efforts, may create in himself not only the property in the goods he manufactures, but, because of his special efforts as to the quality of such goods and his direct advertising of these goods, he creates in himself what is known as "goodwill" which is an attribute which he believes adds to the value of the goods. The manufacturer does not sell to the buyer any part of his goodwill upon parting with the property in the goods, except that the goods are identified by the trademark or trade name of the manufacturer, and, therefore, resale of the goods is influenced by the manufacturer's reputation and goodwill, to the retailer's benefit. In other words, the price-cutter sells with the help of the goodwill of the manufacturer, which goodwill he did not buy or help to support. If the retailer does not want this added sales inducement, all he has to do is remove identifying marks, sell the goods as his own, and the provisions of the Fair Trade Law no longer apply. Quoting from *Standard Drug Co., Inc., v. General Electric Co., supra* (202 Va., 367), at page 373, the court said, in considering *Old Dearborn Distributing Co. v. Seagram-Distillers Corp., supra*:

> "It was held that the non-signer section was not so arbitrary, unfair or unreasonable as to constitute a

denial of due process, because it dealt not with a commodity alone, but with a commodity plus its brand or trade-mark; that the vendee owns the commodity but not the goodwill that the trade-mark symbolizes; that the non-signer clause 'does not prevent a purchaser of the commodity bearing the mark from selling the commodity alone at any price he pleases. It interferes only when he sells with the aid of the goodwill of the vendor; and it interferes then only to protect that goodwill against injury. * * * There is nothing in the act to preclude the purchaser from removing the mark or brand from the commodity—thus separating the physical property, which he owns, from the good will, which is the property of another—and then selling the commodity at his own price, provided he can do so without utilizing the good will of the latter as an aid to that end.' * * *."

And, on page 375 of 202 Va., the court said:

"It appears that not only does the present Virginia act clearly meet the conditions required by *Old Dearborn* for constitutional validity (state and federal), but by elimination of the 'non-signer' provision and substitution of the provision that permits the voluntary contractual restriction on minimum resale price to be agreed upon by the manufacturer or distributor and retailer, it has removed the chief ground and reason relied upon by courts that have held Fair Trade Acts to be unconstitutional."

In the case of *Scovill Mfg. Co. v. Skaggs Pay Less Drug Stores, supra* (45 Cal. [2d], 881), the court said on page 888:

"* * * Here the acts of private parties in entering into contracts for the sale of commodities constitute the facts in contemplation of which the Legislature acted, and upon the existence of which the provisions of the enactment were to be applicable. The private contracts are no more legislative in character

than are other acts or conduct of private parties undertaken as a prerequisite to the application of a statute. The consequence that the statute has become applicable, and conduct in violation thereof has become actionable is in no way due to the exercise of any assumed legislative power on the part of the contracting parties * * *."

See, also, *Weco Products Co. v. Reed Drug Co.* (1937), 225 Wis., 474, 274 N. W., 426; and *Goldsmith v. Mead Johnson & Co.* (1939), 176 Md., 682, 7 A. (2d), 176.

Most of the litigation in the federal courts involving state fair trade acts was concerned with conflicts created by statutes. The legislative desire to curb monopolies came into conflict with the desire to support acts dealing with fair trade and to define the rights of a manufacturer to defend against the detriment suffered to its goodwill by price cutters. In no case here cited did the federal courts suggest that "non-signer" clauses constituted a delegation of legislative powers, and, in the *Old Dearborn* case, the "non-signer" clause was found not to offend state or federal constitutional provisions.

There can be no doubt that the "non-signer" provision of the first Fair Trade Act of Ohio, and now the implied-contract provision of the new Act, is the very heart of the Act and that, unless such provision can be enforced, the Act is completely useless.

From the foregoing analysis of the case law and the statutes with which they deal, and the clear purpose of the great majority of the Legislatures of the several states and the Congress of the United States to prevent "price cutting" as inimical to the common good, primarily as to the retail sale of trade-marked or trade-named goods offered for sale on the open market in competition with other goods of the same class below the price designated by the

owner of the goodwill of the goods identified by his trade name or trademark, the obligation of the retailer to maintain fair-trade prices being founded on contractual relations between the manufacturer or dealer and the retailer, as defined by the Fair Trade Act, we must conclude that the Act (Sections 1333.27 to 1333.34, inclusive, Revised Code) was passed within the constitutional powers of the Legislature of Ohio, and that its provisions violate no constitutional rights of the plaintiff or any others in a like situation.

The judgment of the Court of Common Pleas, therefore, is reversed and final judgment entered for the defendants.

Judgments reversed.

KOVACHY, *P.J.*, concurs.

HURD, *J.*, dissenting. On this appeal, the single question presented is whether the 1959 Fair Trade Act (Sections 1333.27 to 1333.34, inclusive, Revised Code) has the effect of nullifying the decision of the Supreme Court in *Union Carbide & Carbon Corp. v. Bargain Fair, Inc.*, 167 Ohio St., 182. In that case, Judge Zimmerman, at page 186, said:

"A majority of this Court has reached the conclusion that Section 1333.07, Revised Code, which prohibits those who are not parties to the stipulated-price contract from selling trade-marked items at a price lower than that stipulated by the manufacturer, is unreasonable and unenforceable and constitutes an unauthorized exercise of the police power in that there is no substantial relation to the public safety, morals or general welfare. Moreover, it contravenes the 'due process' provision of the Ohio Bill of Rights by arbitrarily and monopolistically denying a seller, who has not entered into any price-fixing contract with the

manufacturer, the privilege of disposing of his own property on terms of his own choosing, *and in addition delegates legislative power and discretion to private persons.*" (Emphasis supplied.)

In the case at bar, McNeill, J., sitting by assignment in this county, held in effect that the 1959 Fair Trade Act was subject to certain objections which the Supreme Court found to exist in the 1936 Fair Trade Act (Sections 1333.06 to 1333.10, Revised Code) for two reasons, namely, (1) that the Supreme Court in the *Union Carbide* case rejected the theory of the adequacy of proprietary interest as a basis for fair-trade legislation, and (2) that regardless of any other changes in the Act, the delegation of legislative power and discretion to private persons remains. These provisions were specifically interdicted by the Supreme Court in the *Union Carbide* case.

Inferentially, it should be noted that two other Common Pleas Courts have held that the 1959 Act is subject to certain of the objections found by the Ohio Supreme Court to exist in the 1936 Act.

In the case of *Helena Rubinstein, Inc., v. Cincinnati Vitamin & Cosmetic Distributors Co.*, 84 Ohio Law Abs., 143, Judge Gusweiler of the Common Pleas Court of Hamilton County held the 1959 Act to be unconstitutional on all the grounds asserted by the Supreme Court in the *Union Carbide* case.

The latest decision on the subject was rendered April 14, 1961, by Judge Leach of the Common Pleas Court of Franklin County in the case of *Bulova Watch Co., Inc., v. Ontario Store of Columbus, Inc.*, 86 Ohio Law Abs., 585, who held, on demurrer, in a very able opinion, that the 1959 Act is unconstitutional as a delegation of legislative power to private persons and, in that respect, comes within

the prohibition of the decision of the Supreme Court in the *Union Carbide* case. The logic and reasoning of these opinions, as well as that of McNeill, J., in the instant case, while not in any sense binding upon this Court, are, in my opinion, strongly persuasive on reason, logic and authority.

The great vice in the 1959 Act (as in the 1936 Act) is the delegation of legislative power to private persons without any proper formula, standard or control whatsoever. Thus, those who have the most to gain are granted the greatest delegation of legislative power, and private persons are permitted unlimited license to fix and set prices at will. Thus, the major effect is to permit private persons, by the delegation of legislative power, if they so determine, to increase and maintain high prices, particularly of drugs and vitamins. In the ordinary course of events, this will lead to a monopoly and make it difficult for persons of ordinary means to purchase regularly those aids to health and well-being so necessary under modern conditions. In this respect, the interests of the consuming public are totally ignored and the retailer is prevented from conducting his business as he sees fit.

Inasmuch as I am in accord with the opinion of the trial judge in the case at bar, I feel that no useful purpose would be served by a further discussion of the issues in this dissenting opinion. Therefore, I conclude that the judgment of the Common Pleas Court should be affirmed for the reasons generally set forth in the opinion of the trial judge. In so concluding, I am not unmindful of the case of *Standard Drug Co., Inc., v. General Electric Co.*, 202 Va., 367, 117 S. E. (2d), 289, discussed at great length in the majority opinion. While that case may be somewhat persuasive, it must be distinguished from the instant case in certain respects. (See the opinion of Leach,

J., in the *Bulova Watch Company* case, *supra* [86 Ohio Law Abs., 585].) Regardless of any arguments to the contrary, this Court must be bound by the decision of the Ohio Supreme Court in the *Union Carbide* case which is presently the established law of this state. It is the prerogative of the members of the Supreme Court to determine what weight it shall give to decisions of courts of sister states.

Judgment of the Court of Appeals of Cuyahoga County.

(Dated September 27, 1961.)

(Like Orders filed September 27, 1961, Case Nos. 25,371 & 25,374.)

This cause came on to be heard upon appeal on questions of law, assignment of error, bill of exceptions and exhibits thereto, transcript of the docket and journal entries in the Court of Common Pleas of Cuyahoga County, Ohio, and briefs, and was argued by counsel and submitted to the Court.

Upon consideration whereof, this Court finds as follows in the record and proceedings aforesaid:

1. Sections 1333.27 through 1333.34 of the Ohio Revised Code are valid, lawful, and enforceable enactments of the Ohio General Assembly and are neither in violation of the Constitution of the State of Ohio, nor in violation of the Constitution of the United States.

2. The Court of Common Pleas of Cuyahoga County erred to the prejudice of the appellant in declaring said sections to be in violation of the Constitution of the State of Ohio, and therefore void and not binding upon the appellee, and in granting judgment for the appellee on its petition and dismissing the cross-petition of the appel-

lant, when judgment should have been entered for the appellant on such petition and said cross-petition should not have been dismissed.

It is therefore considered, ordered, and adjudged by this Court that the judgment of the Court of Common Pleas of Cuyahoga County be and the same hereby is reversed and held for naught. And the Court coming now to render the judgment which the Court of Common Pleas of Cuyahoga County ought to have rendered, it is ordered that Sections 1333.27 through 1333.34 of the Ohio Revised Code be and the same hereby are declared to be valid, lawful, and enforceable enactments of the Ohio General Assembly and neither in violation of the Constitution of the State of Ohio nor of the Constitution of the United States; that final judgment be and the same hereby is now entered for the appellant on the petition filed in this cause in the Court of Common Pleas of Cuyahoga County by the appellee; that this cause be remanded to the Court of Common Pleas of Cuyahoga County to carry this judgment into effect and for execution, and for further proceedings according to law with respect to the cross-petition filed in this cause by the appellant; and that the appellant recover from the appellee his costs herein expended. To all of which, appellee, by counsel, excepts.

Signed: Julius M. Kovachy,
Presiding Judge.

Opinion of the Supreme Court of Ohio.

(Appeal Nos. 37,320 and 37,321.)

(Decided May 8, 1963.)

APPEALS from the Court of Appeals for Cuyahoga County.

These two causes originated in the Court of Common Pleas of Cuyahoga County, in each of which is sought a declaratory judgment that the Ohio Fair Trade Act, Sections 1333.27 through 1333.34, Revised Code, is invalid and unconstitutional. The facts in both cases are similar and the law applicable is the same. The appeals will be treated together, since the assignments of errors in both cases are exactly the same.

Hudson Distributors, Inc., a Michigan corporation, operates a number of retail stores in Cleveland. It brought these actions for the purpose of testing the constitutionality of the 1959 Ohio Fair Trade Act. In one case, Hudson named as defendant the Eli Lilly Company, and, in the other, The Upjohn Company. Both companies had complied with the Fair Trade Act, and Hudson had entered into no written contract with either. Hudson procured the merchandise of Lilly from a distributor in Detroit. Upjohn sold direct to the retailer or at times to the wholesaler. Hudson sold the merchandise for less than the fair-trade price.

In both causes, the Court of Common Pleas found that the Fair Trade Act is unconstitutional as an unlawful delegation of legislative power.

Those judgments were reversed by the Court of Appeals, and the causes are before this Court pursuant to the allowance of motions to certify the records.

GRIFFITH, J. In *Union Carbide & Carbon Corp. v. Bargain Fair, Inc.* (1958), 167 Ohio St., 182, we deter-

mined that a prior Fair Trade Act (1936) containing a nonsigner provision was invalid. The syllabus reads:

> "Section 1333.07, Revised Code, a part of the Ohio Fair Trade Act, which prohibits those who are not parties to a price-fixing contract between the producer of a trade-marked commodity and another from selling such commodity for less than the price stipulated in such contract, represents an unauthorized exercise of the police power in a matter unrelated to the public safety, morals or general welfare, delegates legislative power to private persons, unconstitutionally denies the owner of property the right to sell it on terms of his own choosing and is invalid."

In the *Bargain Fair* case we were concerned primarily with the nonsigner provisions. Following the judgment in that case, a new Ohio Fair Trade Act (128 Ohio Laws, 698) was enacted, which act became effective October 22, 1959, and it is this legislation that is now being assaulted and is the sole cause of this controversy.

The heart of the new act, the implied contract doctrine is spelled out in Section 1333.28 (I), Revised Code. "Contract" is defined therein as "any agreement, written or verbal, or arising from the acts of the parties." That section provides further that a person who acquires a commodity "directly from the proprietor or otherwise" after actual notice that the proprietor has established a minimum resale price is bound to observe that price; and that such a person by accepting the commodity "shall thereby have entered into an agreement with such proprietor not to resell such commodity at less than the minimum price stipulated therefor by such proprietor."

A person who acquires such commodity after actual notice and then sells, offers to sell or advertises to sell such commodity at a price lower than the established minimum

resale price commits an act of unfair competition. Section 1333.32 (A), Revised Code.

Section 2, Article XIII, should not be read out of the Ohio Constitution or rendered meaningless. The provision means just what it says—the General Assembly can pass laws "regulating the sale and conveyance" of personal property. The new Ohio Fair Trade Act is just such a law. The new act is much more comprehensive than the prior act and introduces into the law two entirely new concepts.

It should be pointed out at this time that one element of the act cannot be overemphasized, namely, that the act applies only to trademark items which are in free and open competition with other goods of the same nature in the same general area. This is one of the most important features of this act. The act does not restrain competition since it may only apply to merchandise which is in free and open competition with goods of a like nature.

The first of the new concepts incorporated in this new act is contained in Section 1333.31, Revised Code, which reads as follows:

> "A proprietor shall retain a proprietary interest in any commodity with respect to which he is a proprietor after he has sold it to distributors, so long as such commodity continues to be identified by his trademark or trade name, by reason of his interest in stimulating demand for such commodity through effective distribution to ultimate consumers and of his interest in continuing protection of the goodwill associated with his trademark or trade name."

By this section, the General Assembly has extended the original concept of the trademark, that of protecting the owner from others marketing their goods under his trademark, to include as a part of the ownership a continuing proprietary interest in the trademark or trade name on the merchandise to the extent that the proprietor

can control the resale price of the merchandise even after it has left his possession and ownership. It is contended that the General Assembly has no power to create such ownership. In this the opponents of this legislation fail to take into consideration that all ownership of property and the incidents relating thereto arise only as a matter of law. Inasmuch as all ownership of property arises only by law, the law may also impose such reasonable conditions and incidents of ownership as are necessary to protect not only the owner but the public in general, *i.e.*, such conditions as are necessary for the general welfare. Many such conditions are imposed by law. For example, land may be conveyed only by following the procedure prescribed by statutes, motor vehicles may be transferred only by certificate of title, and it is only because the law so provides that property may be transmitted by will. It is fundamental that property may be used only so long as its use does not interfere with the public welfare. Thus, although one may own a motor vehicle, the use thereof is subject to strict regulation. The ownership of property secured by the Constitution is necessarily subject to regulation by law. The General Assembly, after extensive and exhaustive hearings, determined that such extension of proprietary rights was necessary not only to protect the property rights incorporated in the ownership of a trademark or trade name but also to protect the small-business man and the public in general.

In such a matter, in the absence of conclusive evidence to the contrary we cannot substitute our judgment for that of the legislative body. Where the wisdom of a legislative act is debatable, the legislative determination must stand.

"Where such questions of fact [the need for fair-trade legislation] are fairly debatable, this Court does not sub-

stitute its judgment for that of the General Assembly but accepts and carries into effect its declared policy." *Kinsey Distilling Sales Co. v. Foremost Liquor Stores, Inc.*, 15 Ill. (2d), 182, 188.

This brings us to a consideration of the second of the new concepts incorporated in the new act. Section 1333.28 (I), Revised Code, reads as follows:

> " 'Contract' means any agreement, written or verbal, or arising from the acts of the parties. The establishment by a proprietor of a minimum resale price for any commodity pursuant to the provisions of Section 1333.29 of the Revised Code and the proprietor's permission for a distributor to acquire and use the proprietor's interest in the trademark or trade name in reselling the commodity shall constitute a contract and sufficient consideration from the proprietor for a promise by the distributor not to sell such commodity at less than the minimum price established by the proprietor. Any distributor (whether he acquires such commodity directly from the proprietor or otherwise) who, with notice that the proprietor has established a minimum resale price for a commodity, accepts such commodity shall thereby have entered into an agreement with such proprietor not to resell such commodity at less than the minimum price stipulated therefor by such proprietor."

This provision is the core of the act. When read in conjunction with the rest of the act, it provides in essence that, when a retailer with notice that an item has been fair-traded procures it for resale, he is deemed to have entered into an implied contract with the owner of the trademark that he will sell the item at the fair-trade price.

There is no question that express price maintenance contracts are valid. *Garst v. Harris*, 177 Mass., 72; *Grogan v. Chaffee*, 156 Cal., 611.

The statute creates an implied contract by act of the parties. The doctrine of implied contracts is almost as old as the law of contracts. The simple illustration of the appellees that, where one takes a candy bar from a grocer's shelf and eats it, he obligates himself to pay for it is a basic example of an implied contract by act. No word need be said; conduct creates the contract.

It must be remembered that there is no compulsion on a retailer to handle the trademarked goods. Since the act applies only to goods which are in free and open competition with goods of the same nature, he may select other goods for sale. If he selects the fair-trade goods, it is his voluntary act, and he must abide by the conditions imposed thereon by the proprietor. The fact that he may not like the conditions is inconsequential. Most of us are forced by circumstances to enter into contracts where we do not like the conditions imposed on us, yet if we voluntarily accept the merchandise we must abide by the conditions attached thereto. For example, in purchasing a home, there are in most instances restrictive covenants as to use. We may not like such conditions, but if we accept the contract we must abide thereby. Liking or not liking the conditions of acquiring property has no effect on the validity of the contract. If the retailer chooses to accept the goods, he is bound by the conditions imposed thereon, in this instance, the fair-trade price.

It is stated as follows in *Old Dearborn Distributing Co. v. Seagram-Distillers Corp.*, 299 U. S., 183, 193, 194:

> "Appellants here acquired the commodity in question with full knowledge of the then-existing restriction in respect of price which the producer and wholesale dealer had imposed, and, of course, with presumptive if not actual knowledge of the law which authorized the restriction. Appellants were not ob-

liged to buy; and their voluntary acquisition of the property with such knowledge carried with it, upon every principle of fair dealing, assent to the protective restriction, with consequent liability under Section 2 of the law by which such acquisition was conditioned. Cf. *Provident Institution v. Jersey City*, 113 U. S., 506, 514-515; *Vreeland v. O'Neil*, 36 N. J. Eq., 399, 402; same case on appeal, 37 N. J. Eq., 574, 577."

Once trademarked goods come into Ohio the law imposes certain conditions thereon, and they are held subject to those conditions.

Legislative conditions and contracts are not new in the law, they appear in many instances, and once the parties enter into an agreement they are bound by the legislative contract no matter what the parties intended. This is exemplified in the law relating to insurance contracts wherein statutory provisions and conditions are imposed in every insurance contract no matter what the intent of the parties. This is true as to statutory bonds, negotiable instruments, bulk sales and mechanics' liens.

This provision of the law is essentially very simple. It is simple contract law. The owner of a trademark offers his goods bearing that mark which are in free and open competition in the open market for resale, on condition that the retail price be maintained at a certain level. This is basic contract law; an offer may be made on condition. Under the Ohio law, the owner of the trademark, once the goods enter into Ohio, has by statute sufficient interest to control the resale price of the goods. The acceptance of this offer is purely voluntary, but if it is accepted it must be accepted on the imposed conditions or not at all. If the offer is accepted, the retailer in consideration of the goodwill attached to the trademark and the demand created by the owner thereof contracts to sell it at the agreed price.

We come now to a consideration of the power of the General Assembly to enact these sections. The avowed legislative purpose is contained in Section 1333.27, Revised Code, which reads as follows:

"(A) Sections 1333.27 to 1333.34, inclusive, of the Revised Code, are enacted in the exercise of the police powers of the state and in pursuance of the power specifically granted the General Assembly by the people in Section 2 of Article XIII, Ohio Constitution, to regulate the sale and conveyance of personal property, and the purposes of Sections 1333.27 to 1333.34, inclusive, of the Revised Code, are generally to protect and preserve small business, to safeguard the goodwill of trademarks and trade names, to further wholesome competition, to prevent monopoly in the distribution of goods, and to promote the public welfare by securing wider distribution of commodities and an increase in the production thereof, and thereby reducing production and distribution costs, protecting and increasing gainful employment in manufacturing, wholesaling and retailing, all for the benefit of the consumer and the well-being of the citizens of the state.

"(B) It is the further purpose of Sections 1333.27 to 1333.34, inclusive, of the Revised Code, to promote the distribution in commerce in the state of identified merchandise which is in free and open competition with other articles of the same general class. Where fair, equitable, and competitive prices cannot be maintained in all appropriate stages in the distribution of such identified merchandise, the marketing of such merchandise is depressed and the quantity thereof moving in the channels of commerce in the state declines.

"(C) To remove obstructions to the marketing of identified merchandise in commerce which are occasioned by unfair selling practices, it is the policy of the state to afford distributors of identified mer-

chandise an effective means whereby the sale of such merchandise at all appproprlate stages of distribution may be consummated at prices adequate to stimulate distribution and low enough to enable distributors of such identified merchandise to compete effectively with those marketing other goods, who by size and dominance may distribute such goods through their own retail outlets or by franchise or consignment methods, and to satisfy the needs of ultimate consumers."

Whether such conditions and controls are within the police power as declared by the General Assembly must be determined by an examination of known economic conditions.

Even to the most casual observer it is readly apparent that the small independent merchant is gradually being forced out of business through the operation of the large merchandising establishments. Even without discounting fair-trade items, these large merchants through their tremendous buying power are able by quantity buying to legitimately undersell the small merchant and to attract his trade. When, in addition to this legitimate underselling, the discounter uses fair-trade items as a come-on, selling items at cost or even at a loss to entice customers into his store, it is apparent that the small merchant will be doomed, he cannot afford to compete on this level, and his customers will go to the discounter to buy. Yet this small independent merchant is a necessary and integral part of the community. It is to him that the consumer turns for little-called-for items that the discounter does not choose to handle, and quite frequently it is to him that the customer turns for the personal service not rendered by the large discount establishments. Yet, as a result of the discounting of fair-trade merchandise, so much of his trade is being drained from him that he can-

not afford to continue his business. Clearly, it is to the advantage of the general public that such establishments be preserved.

So much for the small-business man. We turn now to a consideration of the right to protect the owner of the trademark. It is beyond question that the goodwill of a trademark is a valuable property right. In *McLean v. Fleming*, 96 U. S., 245, 252, the court said:

> "Everywhere courts of justice proceed upon the ground that a party has a valuable interest in the goodwill of his trade, and in the labels or trademark which he adopts to enlarge and perpetuate it. Hence it is held that he, as proprietor, is entitled to protection as against one who attempts to deprive him of the benefits resulting from the same, by using his labels and trademark without his consent and authority."

The majority of present-day consumer purchasing is by brand name. Today the public demand necessary for retail selling is created to a great extent not by the retailer but by the manufacturer, the owner of the trademark. One of the greatest expenses of modern day merchandising is the creation of the demand for the product. This expense, which is borne in a great part by the proprietor, at times may even exceed the original manufacturing cost of the product itself. The value of any trademark is, of course, the demand for the product which it represents. The continued discount selling of a trademarked product eventually cheapens it in the eyes of the purchasing public. If such product is sold at a reduced price the public will eventually get the idea that the product is cheap and turn to others, seeking higher quality merchandise. It does not occur to them that the quality is good and that the discounter is using the merchandise as a loss leader

to advertise his store. This fact is well borne out by the fact that it is the owner of the trademark who urges that his merchandise be fair-traded. If discount selling did not injure his total sales, he would have no interest in the retail price. It must be remembered that the proprietor sells his goods at the same price and reaps the same unit profit no matter what price the ultimate consumer pays. Clearly, the owners of trademarks have discovered that discount selling of their products eventually cheapens them in the eyes of the public with the ultimate effect of injuring the value of the trademark or trade name and reducing their total sales. See *National City Bank v. National City Window Cleaning Co.*, 174 Ohio St., 510.

When the general welfare of the small merchant is considered together with the necessity of protecting the goodwill and value attached to a trademark, it was clearly within the legislative power to enact such protective legislation, and the court will not substitute its judgment in this instance for that of the General Assembly. In *Old Dearborn v. Seagram, supra,* at pages 195 and 196, the court said:

> "There is a great body of fact and opinion tending to show that price cutting by retail dealers is not only injurious to the goodwill and business of the producer and distributor of identified goods, but injurious to the general public as well. The evidence to that effect is voluminous; but it would serve no useful purpose to review the evidence or to enlarge further upon the subject. True, there is evidence, opinion and argument to the contrary; but it does not concern us to determine where the weight lies. We need say no more than that the question may be regarded as fairly open to differences of opinion. The legislation here in question proceeds upon the former and not the latter view; and the legislative determination in that respect, in the circumstances here disclosed, is conclusive so far as

this court is concerned. Where the question of what the facts establish is a fairly-debatable one, we accept and carry into effect the opinion of the Legislature."

Two other matters are urged as to the constitutionality of this legislation.

The first of these relate to the delegation of legislative power as to price fixing.

In the first place, this is not price fixing as commonly understood in the law. Here we have the producer of a commodity, which is in free and open competition with other goods of the same nature, fixing the price only of his own commodity; and not a fixing of prices for all the commodities in the same field. Here if a producer fixes his prices too high the consumer will turn to other producers for his needs.

Second, this is not legislative price fixing but price maintenance contracts between the producer and retailer, and the fact that such a contract may in some instances be implied does not affect the validity of the act. We have already found that such contracts are valid. Thus, this contention is not well founded.

The final contention is that such act violates the constitutional right of one to sell his own property on his own terms. It having been determined that the implied contracts herein are valid, the retailer takes the goods on the conditions of the offer and thus voluntarily agrees to comply with the fair-trade price.

The General Assembly has re-enacted fair-trade laws in Ohio. In so doing it met constitutional objections to the former act (1936) expressed by this Court in the *Bargain Fair* case. The nonsigner provision of the old law was eliminated. A retailer will be bound to fair-trade a product only by his own contract, either a written contract or a

contract implied under the specific statutory language from the retailer's conduct in accepting the product for resale after notice of its being subject to fair trade.

It is the intention of the new act to declare and protect the proprietary interest of a manufacturer in his trademark and the goodwill attached to it. Cf. *National City Bank v. National City Window Cleaning Co., supra.* The means employed by the act is the long and well established legal doctrine of implied contract. None of the constitutional attacks on this new act have merit.

For the reason that fewer than six members of the court are of the opinion that the Fair Trade Act is unconstitutional, the court cannot so declare it. Section 2, Article IV, Constitution.

The judgments of the Court of Appeals are affirmed.

Judgments affirmed.

TAFT, C. J., and HERBERT, J., concur.

ZIMMERMAN, MATTHIAS, O'NEILL and GIBSON, JJ., dissent.

ZIMMERMAN, J., dissenting. The writer dissents for the reason that, in his opinion, the new Fair Trade Act (Section 1333.05 *et seq.*, Revised Code) possesses the same vulnerability as did the old act since, in effect, it attempts arbitrarily to bind nonsigners of price-fixing contracts by artificial and unauthorized legislative fiat and undertakes to control the price at which trademarked merchandise may be sold by the purchasers thereof, who bear no relationship whatsoever to the producers of such merchandise.

In my view, the reasons for holding a part of the old act unconstitutional, as expressed in the case of *Union Carbide & Carbon Corp. v. Bargain Fair, Inc.*, 167 Ohio

St., 182, 147 N. E. (2d), 481, are still valid in relation to the new act.

MATTHIAS, O'NEILL and GIBSON, JJ., concur in the foregoing dissenting opinion.

Judgment of the Supreme Court of the State of Ohio.
(Dated May 8, 1963.)

(Like Orders filed May 8, 1963, in appeal, Case Nos. 37,320 and 37,321.)

This cause, here on appeal from the Court of Appeals for Cuyahoga County, was heard in the manner prescribed by law. On consideration thereof, the judgment of the Court of Appeals is affirmed; and it appearing that there were reasonable grounds for this appeal, it is ordered that no penalty be assessed herein.

It is further ordered that the defendant appellee recover from the plaintiff appellant its costs herein expended; that a mandate be sent to the Court of Common Pleas to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Cuyahoga County for entry.

APPENDIX B.

Statutes Involved.

Ohio Fair Trade Act of 1959

(Ohio Revised Code Sections 1333.27 through 1333.34)

Sec. 1333.27. (A) Sections 1333.27 to 1333.34, inclusive, of the Revised Code are enacted in the exercise of the police powers of the state and in pursuance of the power specifically granted the general assembly by the people in Section 2 of Article XIII, Ohio Constitution, to regulate the sale and conveyance of personal property, and the purposes of sections 1333.27 to 1333.34, inclusive, of the Revised Code, are generally to protect and preserve small business, to safeguard the good will of trade-marks and trade names, to further wholesome competition, to prevent monopoly in the distribution of goods, and to promote the public welfare by securing wider distribution of commodities and an increase in the production thereof, and thereby reducing production and distribution costs, protecting and increasing gainful employment in manufacturing, wholesaling and retailing all for the benefit of the consumer and the well-being of the citizens of the state.

(B) It is the further purpose of sections 1333.27 to 1333.34, inclusive, of the Revised Code, to promote the distribution in commerce in the state of identified merchandise which is in free and open competition with other articles of the same general class. Where fair, equitable, and competitive prices cannot be maintained in all appropriate stages in the distribution of such identified merchandise, the marketing of such merchandise is depressed and the quantity thereof moving in the channels of commerce in the state declines.

(C) To remove obstructions to the marketing of identified merchandise in commerce which are occasioned by unfair selling practices, it is the policy of the state to afford distributors of identified merchandise an effective means whereby the sale of such merchandise at all appropriate stages of distribution may be consummated at prices adequate to stimulate distribution and low enough to enable distributors of such identified merchandise to compete effectively with those marketing other goods, who by size and dominance may distribute such goods through their own retail outlets or by franchise or consignment methods, and to satisfy the needs of ultimate consumers.

Sec. 1333.28. As used in sections 1333.27 to 1333.34, inclusive, of the Revised Code:

(A) "Commodity" means any subject of commerce.

(B) "Producer" means any grower, baker, maker, manufacturer, bottler, packer, converter, processor, or publisher.

(C) "Wholesaler" means any person selling a commodity other than a producer or retailer.

(D) "Retailer" means any person engaged in business selling a commodity to consumers for use.

(E) "Distributor" means any person who acquires a commodity for the purpose of resale.

(F) "Person" means an individual, corporation, partnership, association, joint-stock company, business trust, or any unincorporated organization.

(G) "Trade-mark" means any word, name, symbol, or device, or any combination thereof, used by a producer or distributor to identify his commodity and distinguish it from that produced or distributed by others.

(H) "Trade name" means personal names, and any word, words, symbol, or symbols, used by producers or

distributors to identify their companies, firms, or corporations.

(I) "Contract" means any agreement, written or verbal, or arising from the acts of the parties. The establishment by a proprietor of a minimum resale price for any commodity pursuant to the provisions of section 1333.29 of the Revised Code and the proprietor's permission for a distributor to acquire and use the proprietor's interest in the trade-mark or trade name in reselling the commodity shall constitute a contract and sufficient consideration from the proprietor for a promise by the distributor not to sell such commodity at less than the minimum price established by the proprietor. Any distributor (whether he acquires such commodity directly from the proprietor or otherwise) who, with notice that the proprietor has established a minimum resale price for a commodity, accepts such commodity shall thereby have entered into an agreement with such proprietor not to resell such commodity at less than the minimum price stipulated therefor by such proprietor.

(J) "Notice" means actual notice given by any method provided in section 1333.30 of the Revised Code, or otherwise established by legally admissible evidence.

(K) "Proprietor" means:

(1) A person who identifies a commodity produced by him by the use of his trade-mark or trade name, unless he has specifically granted to another person sole authority to establish minimum resale prices for such commodity;

(2) A person who identifies a commodity distributed by him by the use of his own trade-mark or trade name;

(3) A person who has been specifically granted by the producer or distributor of a commodity which is identified by the trade-mark or trade name of such

producer or distributor the sole authority to establish minimum resale prices for such commodity in the state.

Sec. 1333.29. (A) It shall be lawful, anything in sections 1331.01 to 1331.14 of the Revised Code or otherwise provided in the Revised Code to the contrary notwithstanding, for a proprietor to establish and control by notice to distributors or by contract, stipulated minimum resale prices for a commodity of which he is the proprietor and which is in free and open competition with commodities of the same general class produced by others and offered for sale in the same general market area. Such minimum resale prices may be differentiated as to various levels of distribution, provided such differentiations are not otherwise unlawfully discriminatory. Such prices may be changed from time to time by written notice to distributors who acquired such commodity with notice of any established minimum resale price. A proprietor may so establish such minimum resale prices for his wholesale distributors, notwithstanding section 1333.34 of the Revised Code, even though he sells such commodity to retailers in competition with such wholesale distributors, if such sales to retailers are made at prices not less than those he establishes for such wholesale distributors for comparable sales.

(B) Any such contract or notice may contain the following provisions:

(1) That the buyer will not resell such commodity at less than the minimum resale price stipulated by the proprietor thereof for the level of distribution at which the buyer resells the same;

(2) That the buyer will require from any distributor to whom he may resell such commodity an agreement that such distributor will not, in turn,

resell such commodity at less than the minimum resale price stipulated by the proprietor thereof for the level of distribution at which such distributor resells and that such distributor, if he resells to another distributor, will make the same agreement with the distributor to whom he may resell;

(3) That the seller will require from any other distributor to whom he may sell other items of such commodity an agreement that such distributor will not, in turn, resell such commodity at less than the minimum resale price stipulated by the proprietor for the level of distribution at which such distributor resells and that such distributor, if he resells to another distributor, will make the same agreement with the distributor to whom he may resell.

(C) Any contract or notice authorized by and entered into pursuant to any of the provisions of sections 1333.27 to 1333.34, inclusive, of the Revised Code, shall be for the benefit of the proprietor and any distributor who is bound by a similar contract or notice.

Sec. 1333.30. Actual notice of stipulated minimum resale prices may be given to any person by mail, through advertising, or through notice attached to merchandise, to containers, packages, or dispensers thereof, or on the invoice therefor, or imparted orally. Deposit in the United States mail, with postage prepaid, of a letter properly addressed to a distributor and specifying minimum resale prices established by a proprietor shall constitute prima facie evidence of actual notice to said distributor of such resale prices. The acquisition of or dealing in merchandise clearly marked, or enclosed in containers, packages or dispensers clearly marked, or the invoice for which was clearly marked, with minimum resale prices established by a proprietor shall be conclusive evidence of actual notice of such minimum resale prices. Actual notice may

also be otherwise established by legally admissible evidence. A person with actual notice of any applicable minimum resale price is thereby charged with notice that such a price is subject to change.

Sec. 1333.31. A proprietor shall retain a proprietary interest in any commodity with respect to which he is a proprietor after he has sold it to distributors, so long as such commodity continues to be identified by his trade-mark or trade name, by reason of his interest in stimulating demand for such commodity through effective distribution to ultimate consumers and of his interest in continuing protection of the good will associated with his trade-mark or trade name.

Sec. 1333.32. (A) Except as provided in section 1333.33 of the Revised Code, it shall be unlawful and an act of unfair competition for any distributor with notice that a proprietor has established a stipulated minimum resale price for a commodity of which he is the proprietor or for any distributor who is in contract with a proprietor not to sell a commodity for which such proprietor has established a stipulated minimum resale price, at less than such stipulated minimum resale price to sell, offer to sell, or advertise such a commodity for sale at a price lower than such stipulated minimum resale price. In determining whether the sale or offer to sell or advertisement for sale of any commodity is below the stipulated minimum resale price established by the proprietor for such commodity there shall be deducted from the price at which such commodity is sold, offered for sale, or advertised for sale the value of any article or thing of exchange or extrinsic value or any concession made, whether by the giving of coupons or otherwise, which is given or to be given in connection with

such sale or offering to sell and the sale or offering for sale of such commodity with any other commodity for a single or combined price, or the giving of or offering to give any credit or allowance in excess of the actual market value thereof, or the failure to add any tax occasioned by or upon the sale of such commodity shall also be taken into consideration in determining whether such sale, offer to sell, or advertisement for sale is below the minimum resale price stipulated for such commodity by the proprietor; provided the allowance by a distributor to his customers of trading stamps or other redeemable certificates, when the amount or value of such allowance does not exceed three per cent of such stipulated minimum resale price, where the posted or advertised price of any commodity or commodities is not less than the stipulated minimum resale price thereof, shall not constitute the offering or making of a gift or concession prohibited by this section nor a violation of any of the provisions of sections 1333.27 to 1333.34, inclusive, of the Revised Code.

(B) Any person suffering or reasonably anticipating damage by reason of a violation of this section may bring suit in any court of competent jurisdiction in the state to

(1) Recover the amount of damages sustained as a result thereof;

(2) Obtain injunctive relief whether or not specific monetary damages are established;

(3) Recover the costs of suit, including reasonable attorney fees, which costs and attorney fees may be recovered whether or not specific monetary damages are established.

(C) It shall be no defense to a prayer for an injunction in any such action that there is an adequate remedy at law.

Sec. 1333.33. It shall be a defense to an alleged violation of section 1333.32 of the Revised Code, for a distributor to prove that a commodity has been advertised, offered for sale, or sold:

(A) In closing out such distributor's stock of such commodity for the bona fide purpose of discontinuing dealing in such commodity and plain notice of that fact is given to the public; provided, the distributor of such stock shall give to the proprietor of such commodity prompt and reasonable notice in writing of his intention to close out such stock, and an opportunity to purchase such stock of such commodity at the original invoice price;

(B) When the stock of such commodity is altered, secondhand, damaged, defaced, or deteriorated and plain notice of that fact is given to the public in the advertisement and sale thereof, such notice to be conspicuously displayed in all advertisements and affixed to the commodity;

(C) By an officer acting under an order of court;

(D) After the distributor has removed from such commodity all trace of the proprietor's identifying trademark or trade name and that in such sale or offer to sell or advertisement for sale no statement, representation, or suggestion of any kind is made which would identify such commodity with the trade-mark or trade name of the proprietor.

Sec. 1333.34. Sections 1333.27 to 1333.34, inclusive, of the Revised Code, shall not, except as otherwise specifically provided in section 1333.29 of the Revised Code, apply to any contract, agreement, or understanding between or among producers, or between or among distributors, or between or among wholesalers.

Miller-Tydings Act.

"*Section 1.* Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: *Provided, That nothing herein contained shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trade mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 5, as amended and supplemented, of the Act entitled 'An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes,' approved September 26, 1914; Provided further, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other.* * * *"

The McGuire Act.

"*Sec.* 5. (a) (1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.

(2) Nothing contained in this Act or in any of the Antitrust Acts shall render unlawful any contracts or agreements prescribing minimum or stipulated prices, or requiring a vendee to enter into contracts or agreements prescribing minimum or stipulated prices, for the resale of a commodity which bears, or the label or container of which bears, the trade-mark, brand, or name of the producer or distributor of such commodity and which is free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale.

(3) Nothing contained in this Act or in any of the Antitrust Acts shall render unlawful the exercise or the enforcement of any right or right of action created by any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia, which in substance provides that willfully and knowingly advertising, offering for sale, or selling any commodity at less than the price or prices prescribed in such contracts or agreements whether the persons so advertising, offering for sale, or selling is or is not a party to such a contract or agreement, is unfair competition and is actionable at the suit of any person damaged thereby.

(4) Neither the making of contracts or agreements as described in paragraph (2) of this subsection, nor the exercise or enforcement of any right or right of action as described in paragraph (3) of this subsection shall constitute an unlawful burden or restraint upon, or interference with, commerce.

(5) Nothing contained in paragraph (2) of this subsection shall make lawful contracts or agreements providing for the establishment or maintenance of minimum or stipulated resale prices on any commodity referred to in paragraph (2) of this subsection, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other."

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In the Supreme Court of the United States

No. 490.

OCTOBER TERM, 1963.

HUDSON DISTRIBUTORS, INC.,
Appellant,

v.

ELI LILLY AND COMPANY,
Appellee.

MOTION TO DISMISS.

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HUDSON DISTRIBUTORS, INC.,
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v.

ELI LILLY AND COMPANY,
Appellee.

MOTION TO DISMISS.

The Appellee moves this Court to dismiss the appeal herein on the grounds that the facts in this case do not raise the questions argued by Appellant, and in any event do not present a substantial federal question.

PRELIMINARY STATEMENT.

The new Ohio Fair Trade Act was held constitutional and valid by the Ohio Supreme Court on May 8, 1963. From this decision Appellant has filed its appeal in this Court. The appeal should be dismissed for three reasons:

1. Appellant's arguments that the Ohio Fair Trade Act violates the Supremacy Clause of the United States Constitution are based upon hypothetical situations not present in this case.

2. Appellant's argument that the Ohio Fair Trade Act violates the Due Process Clause of the Fourteenth Amendment has already been rejected by this Court in *Old Dearborn Distributing Co. v. Seagram-Distillers Corp.*, 299 U. S. 183, 81 L. Ed. 109 (1936).

3. The history of fair trade in the United States Congress and in the federal courts shows that the Ohio Fair Trade Act is valid under federal law.

ARGUMENT.

I. Appellant's Arguments Based on Supremacy Clause Involve Hypothetical Questions.

Appellant's charges that the Ohio Fair Trade Act violates the Supremacy Clause of the United States Constitution are not applicable to the facts in this case.

(A) Appellant argues that the Act "attempts to repeal" Section 5(a)(5) of the McGuire Act and Section 1 of the Sherman Anti-Trust Act by authorizing the proprietor of a trademark or trade name to establish minimum resale prices for wholesalers with whom the proprietor is in competition. (Jurisdictional Statement p. 4.)

This is not an issue in this case.

The record below shows that Appellee sells its products to wholesalers only; it does not sell directly to any pharmaceutical retailers and is not in competition with its wholesalers.

(B) Appellant argues that the Act "attempts to repeal" Section 5(a)(5) of the McGuire Act and Section 1 of the Sherman Anti-Trust Act by authorizing a proprietor to compel its distributors to enter into horizontal price maintenance agreements. (Jurisdictional Statement p. 4.)

This is not true.

The Act plainly states that *only* vertical agreements—that is, agreements between a manufacturer and a wholesaler, or between a manufacturer and a retailer—are lawful. Ohio Revised Code Section 1333.34. Furthermore, there is nothing in the record below to indicate that Appellee's wholesalers have entered into horizontal price maintenance agreements; and in fact they have not.

(C) Appellant argues that the Act "attempts to repeal" Sections 5(a)(2), (3), (4) and (5) of the McGuire Act and Section 1 of the Sherman Anti-Trust Act by authorizing the establishment of resale prices by notice only. (Jurisdictional Statement p. 4).

This also is not true.

The Ohio Fair Trade Act authorizes a manufacturer to establish minimum resale prices in *either* of two ways: by written contract *or* by notice. Ohio Revised Code Section 1333.29(A). The establishment by written contract of such prices which are binding on non-signers was approved by this Court in *Old Dearborn Distributing Co. v. Seagram-Distillers Corp.*, 299 U. S. 183, 81 L. Ed. 109 (1936) and specifically authorized by the McGuire Act. 15 U. S. C. A. Sec. 45. This is the method which the Appellee has adopted. Appellee has not established minimum resale prices for its products by notice only, but *by written contracts* with over 1400 retailers in the State of Ohio.

All three of these arguments are based upon hypothetical situations not present in this case. This Court has consistently refused to decide hypothetical questions. *Local No. 8-6 v. Missouri*, 361 U. S. 363, 4 L. Ed. 2d 373 (1960) (syl. 4); *Safeway Stores v. Oklahoma Retail Grocers Ass'n*, 360 U. S. 334, 3 L. Ed. 2d 1280 (1959) (syl. 3); *International L. & W. Union v. Boyd*, 347 U. S. 222, 98 L. Ed. 650 (1954) (syl. 3); *Near v. Minnesota*, 283 U. S. 697, 708, 75 L. Ed. 1357, 1363 (1931).

Quite recently this Court stated that "The Supreme Court of the United States will never anticipate a question of constitutional law in advance of the necessity of de-

ciding it." *Communist Party v. S. A. C. Board*, 367 U. S. 1, 6 L. Ed. 2d 625 (1961) (syl. 30). No rule of practice of the United States Supreme Court has become more firmly settled. *Id.* at 72, 6 L. Ed. 2d at 674.

In *Safeway Stores v. Oklahoma Grocers Ass'n*, 360 U. S. 334, 3 L. Ed. 2d 1280 (1959), this Court responded to the Oklahoma Supreme Court's policy of not deciding hypothetical situations by saying—"if this is a rule of wise restraint for the courts of Oklahoma in this situation, it clearly bars constitutional adjudication here." *Id.* at 337, 3 L. Ed. 2d at 1283.

Ohio has adopted a similar rule. The Ohio Supreme Court recently stated that "a statute may be valid as applied to one set of facts and invalid as applied to another." *State v. Wetzel*, 173 Ohio St. 16 (1962) (syl. 1). And the Ohio Supreme Court has long held that it will only determine a question of constitutionality when the facts of the case present it. *Elyer v. Anderson*, 122 Ohio St. 220 (1930).

II. No Substantial Federal Question Is Presented Under the Due Process Clause.

Appellant next argues that the Ohio Fair Trade Act violates the Due Process Clause of the Fourteenth Amendment because it confers upon a manufacturer a proprietary interest in his trademarked or trade named products which permits him to bind non-signing retailers to his minimum resale prices. (Jurisdictional Statement p. 4.)

The proprietary interest feature of state fair trade laws has too long been upheld by this Court to form a basis for this appeal.

In *Old Dearborn Distributing Co. v. Seagram-Distillers Corp.*, 299 U. S. 183, 81 L. Ed. 109 (1936), this Court

recognized and endorsed the proprietary interest concept which is a part of the Ohio Fair Trade Act:

"The essence of the statutory violation then consists not in the bare disposition of the commodity, but in a forbidden use of the trade-mark, brand or name in accomplishing such disposition. The primary aim of the law is to protect the property—namely, the good will—of the producer, which he still owns. The price restriction is adopted as an appropriate means to that perfectly legitimate end, and not as an end in itself." *Id.* at 193, 81 L. Ed. 109 at 119.

"We are here dealing not with a commodity alone, but with a commodity plus the brand or trade-mark which it bears as evidence of its origin and of the quality of the commodity for which the brand or trade-mark stands. Appellants own the commodity; they do not own the mark or the good will that the mark symbolizes. And good will is property in a very real sense, injury to which, like injury to any other species of property, is a proper subject for legislation. Good will is a valuable contributing asset of the business—sometimes the most valuable contributing asset of the producer or distributor of commodities. And distinctive trade-marks, labels and brands, are legitimate aids to the creation or enlargement of such good will." *Id.* at 194, 81 L. Ed. 109 at 119-120.

III. The Ohio Fair Trade Act Is Valid Under Federal Law.

Appellant tries to cloud the issue by extensive references to statements of various federal administrative officials and comments of legislative committees on proposed federal legislation. (For example, Jurisdictional Statement, pp. 14, 19, 21 and 22.)

These references have no bearing on this case. The only actions which are relevant to the validity of the new Ohio Fair Trade Act under federal law are those of the United States Congress and of the courts. And Congress and this Court have consistently and repeatedly given federal sanction to state fair trade laws—by the adoption of the Miller-Tydings Act in 1939, 15 U. S. C. A. Sec. 1; by the decision in *Old Dearborn Distributing Co. v. Seagram-Distillers Corp.*, 299 U. S. 183, 81 L. Ed. 109 (1936); by the adoption of the McGuire Act in 1952, 15 U. S. C. A. Sec. 45; and by the decision in *Schwegmann Bros. Giant Super Markets v. Eli Lilly and Company*, 205 F. 2d 788 (5th Cir. 1953) *cert. den.* 346 U. S. 856, 98 L. Ed. 369 (1953).

We have traveled far down the road in establishing federal approval of state fair trade laws. We are far beyond that point in the road where Appellant would like to stop and argue.

Only two years ago an appeal from a decision of the Supreme Court of Appeals of Virginia which upheld the validity of the new Virginia Fair Trade Act was dismissed by this Court for want of a substantial federal question. *Standard Drug Company, Inc. v. General Electric Company*, 368 U. S. 4, 7 L. Ed. 2d 16 (1961). The Ohio Fair Trade Act was patterned after the Virginia statute, and the same arguments were presented to this Court to accept the *Standard Drug* appeal as are now presented by Appellant in this case. Appellant attempts to distinguish the Virginia and Ohio acts, but its distinctions involve (1) the

provision of the Ohio Act authorizing the establishment of minimum resale prices by notice—which Appellee has not used; (2) an argument concerning horizontal price fixing—which is not authorized by either statute; and (3) an attack on the proprietary interest concept of the two statutes—a concept which this Court approved in *Old Dearborn Distributing Co. v. Seagram-Distillers Corp.*, 299 U. S. 183, 81 L. Ed. 109 (1936).

CONCLUSION.

Appellant's hypothetical questions must await determination in another case at another time. They are not raised by the facts in this case.

The Ohio Fair Trade Act and the facts in this case raise no federal question not already settled by this Court in its decision in the *Old Dearborn* case, its denial of a writ of certiorari in the *Schwegmann* case, and its dismissal of the appeal in the *Standard Drug* case.

Therefore, Appellee respectfully moves the Court to dismiss this appeal.

Respectfully submitted,

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In the Supreme Court of the United States

No. 490.

OCTOBER TERM, 1963.

HUDSON DISTRIBUTORS, INC.,
Appellant,

vs.

ELI LILLY AND COMPANY,
Appellee.

REPLY TO MOTION TO DISMISS.

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REPLY TO MOTION TO DISMISS.

This reply is addressed to the Motion to Dismiss filed by Eli Lilly & Company. ("Lilly.") By this motion and the specious argument that only hypothetical questions are involved, Lilly offers the Court a placebo with the apparent hope that the real issues will pass unnoticed.

The judgment of the Court of Appeals of Cuyahoga County (Jurisdictional Statement, 71, 72) holds that the provisions of the Ohio Fair Trade Act "are neither in violation of the Constitution of the State of Ohio nor in violation of the Constitution of the United States." The judgment of the Court of Appeals was affirmed by the Supreme Court of Ohio. (*Ibid.*, 86.)

Lilly passes off Appellant's argument addressed to Section 5(a) (5) of the McGuire Act and Section 1 of the Sherman Act by contending that its dealings in Ohio are limited to transactions with wholesalers. Lilly then argues that "there is nothing in the record below to indicate that Appellee's wholesalers have entered into horizontal price maintenance agreements."

These arguments do little justice to the record. *Lilly omits all reference to its fair trade contracts with retailers entered into pursuant to the Ohio Fair Trade law.*

I. THE CASE BEFORE THIS COURT INVOLVES AN ACTUAL CONTROVERSY UNDER THE SUPREMACY CLAUSE, NOT A HYPOTHETICAL QUESTION. LILLY IS ATTEMPTING BY NOTICE TO BIND APPELLANT TO A CONTRACT WHICH IS UNLAWFUL UNDER SECTION 5(a)(5) OF THE McGUIRE ACT.

The record in this case establishes that:

1. Lilly *in this case* is attempting to establish minimum resale prices for its products, by contracts with over 1,400 retailers in the State of Ohio. (Motion to Dismiss, at 4.)

2. *Notice* of these written contracts is given to retailers. (Warning Letter from Appellee to Appellant dated December 10, 1959, Exhibit C to Answer and Cross-Petition, Lilly Supplemental Record in the Supreme Court of Ohio, at 2 and 3.) *Notice* of such contracts or of resale prices is required to bind nonsigners to the terms thereof. (Ohio Fair Trade Act, Section 1333.28(I), Section 1333.-29(A), Section 1333.30, Jurisdictional Statement, 89, 90, 91.)

3. The establishment by written contract of retail resale prices and the giving notice thereof is the fair trade method Lilly has adopted. (Motion to Dismiss at 4.)

4. Lilly has demanded that Appellant conduct its future operations "in accordance with the obligations under the contracts and under the Ohio Fair Trade Act * * *." (Second Warning Letter from Appellee to Appellant dated January 26, 1960, Exhibit D to Answer and Cross-Petition, Supplemental Record before the Supreme Court of Ohio, at 4-5.)

By this second warning letter Lilly recalled to Appellant that it had enclosed duplicate copies of the Manufacturer-Retailer Fair Trade Contract; that "under the provisions of the Ohio Fair Trade Act you are obligated to uphold our minimum retail resale prices whether you have signed one of our contracts or not." (*Ibid.*, at 4.)

5. The contract of which notice is given by Lilly to the terms of which Lilly demands adherence by Appellant contains provisions authorized by the Ohio Fair Trade law. The contract states in part:

> "6. Retailer agrees not to knowingly sell any of Manufacturer's 'Identified Commodities' to any dealer who fails to observe the minimum retail resale prices established under Paragraph 3 hereof." (Lilly Record before the Supreme Court of Ohio at 14.)

This provision is embodied in the Lilly Fair Trade Contract pursuant to Sections 1333.29(B)(2) and (B)(3) of the Ohio Revised Code which specifically provide:

> "(B) Any such contract or notice may contain the following provisions:
>
> (2) That the buyer *will require from any distributor to whom he may resell such commodity an agreement that such distributor will not, in turn, resell such commodity at less than the minimum resale price stipulated by the proprietor thereof for the level of distribution at which such distributor resells and that such distributor, if he resell to another distributor, will make the same agreement with the distributor to whom he may resell;*
>
> (3) That the seller will require from any other distributor to whom he may sell other items of such commodity an agreement that *such distributor will not, in turn, resell such commodity at less than the minimum resale price stipulated by the proprietor for the level of distribution at which such distributor*

resells and that such distributor, if he resells to another distributor, will make the same agreement with the distributor to whom he may resell." (Jurisdictional Statement 90-91.)

A "distributor" is defined by Section 1333.28(E) as "any person who acquires a commodity for the purpose of resale." (Jurisdictional Statement, at 88.) A retailer, as well as a wholesaler is thus encompassed by this definition.

6. The Lilly contract, with the restrictive selling provisions and the requirement that each retailer sell Lilly goods only to retailers who observe fair trade pricing, is entered into for the benefit of Lilly and every retailer in the State of Ohio who either contracts with Lilly or has notice of the fair trade contract. Section 1333.29(C) provides:

> "(C) Any contract or notice authorized by and entered into pursuant to any of the provisions of Sections 1333.27 to 1333.34, inclusive, of the Revised Code, *shall be for the benefit of the proprietor and any distributor who is bound by a similar contract or notice.*" (Jurisdictional Statement, 91.)

7. Each and every retailer to whom notice of the Lilly contract is given, whether or not a signer, *is bound by and is in turn the beneficiary of every other such contract or notice.* Consequently, every retailer with notice is bound to refuse to deal with any other retailer who, in the language of Paragraph 6 "fails to observe the minimum retail resale prices established under Paragraph 3 hereof."

8. The requirements for an unlawful combination have been amply satisfied. As this Court held in *United States v. Parke, Davis and Company*, 362 U. S. 29 (1960) at 46-47:

"But if a manufacturer is unwilling to rely on individual self-interest to bring about general voluntary acquiescence which has the collateral effect of eliminating price competition, and takes affirmative action to achieve uniform adherence by inducing each customer to adhere to avoid such price competition, the customers' acquiescence is not then a matter of individual free choice prompted alone by the desirability of the product. The product then comes packaged in a competition-free wrapping—a valuable feature in itself—by virtue of concerted action induced by the manufacturer. *The manufacturer is thus the organizer of a price-maintenance combination or conspiracy in violation of the Sherman Act.*"

9. When Lilly gave notice of its fair trade contracts to Appellant and demanded that Appellant's future operations be "in accordance with the obligations under the contracts and under the Ohio Fair Trade Act * * *," it was giving notice of, and attempting to bind Appellant to, a contract rendered unlawful and unenforceable by Section 5(a)(5) of the McGuire Act.

10. These infirmities were consistently raised and argued in the state courts.

11. Consequently, there is nothing hypothetical about the questions in this case concerning the validity under Section 5(a)(5) of the McGuire Act, of those portions of the Ohio Fair Trade Act authorizing horizontal price fixing. An actual controversy exists between the parties—namely, whether or not Lilly is entitled to enforce fair trade prices established by an unlawful contract which is authorized by a state statute which specifically sanctions violations of Section 5(a)(5) of the McGuire Act. *This contract, which is part of the record in this case, is the very contract upon which the rulings were predicated in the courts below.*

II. THE PROVISIONS OF PARAGRAPH SIX OF THE LILLY RETAIL FAIR TRADE CONTRACTS ARE INTEGRAL TO ITS METHODS OF PRICE SETTING.

Lilly cannot escape the patent invalidity of Paragraph six of its resale price maintenanee contract by arguing that this paragraph may somehow be "disregarded." The fact remains that the paragraph is there and purports to be binding.

Comparable argument have uniformly been attempted before this Court and have uniformly failed. In *International Salt Co. v. United States,* 332 U. S. 392 (1947) this Court affirmed the granting of summary judgment upon agreements by which salt was "tied" to leases of patented salt dispensing machines.* In opposition to the summary judgment, the International Salt Company argued that the tying clause was neither insisted upon in all leases, nor was it always enforced. This Court held that "these facts do not justify the general use of the restriction which has been admitted here." 332 U. S. at 398.

The inclusion of the horizontal price fixing and boycotting provisions of Paragraph 6 of the Lilly contract confirm that these provisions are essential to Lilly's establishment of fair trade prices. Cf. *International Business Machines v. United States,* 298 U. S. 131 (1936), at 137.

III. IT IS IMMATERIAL THAT LILLY DOES NOT COMPETE WITH WHOLESALERS.

Lilly has attempted to sidestep the illegality of the fair trade contract of which it gave notice to Appellant. Lilly argues that it does not sell to retailers and is not in competition with wholesalers. (Motion to Dismiss at 3.)

Lilly's contention is wholly irrelevant to the illegality of its fair trade program under the Ohio statute by reason of Section 5(a)(5) of the McGuire Act which declares that

contracts or agreements "between retailers" and "between persons, firms or corporations in competition with each other" are unlawful. Surely, Lilly is not suggesting either (a) that some or all of its 1,400 Ohio retailers, who have agreed to boycott, and have combined to refuse sales to any price cutter whether in or out of Ohio are not "in competition with each other," or (b) that the 1,400 agreements to boycott discounters are not "between retailers."

Lilly contends, however, that the Ohio Fair Trade law by its terms relates only to *vertical agreements* "that is, agreements between a manufacturer and wholesaler, or between a manufacturer and retailer * * *." Lilly has significantly failed to cite to this Court the statutory exception in the Ohio Fair Trade Act which violates the horizontal price fixing ban of Section 5(a)(5) of the McGuire Act. The key phraseology in Section 1333.34 which the Lilly Brief has ignored provides, "except as specifically otherwise provided in Section 1333.29 of the Revised Code * * *." Section 1333.29(B) and Section 1333.29(C), as above indicated, contain the unlawful horizontal price fixing and boycotting provisions now incorporated in the Lilly contract.

IV. THE INTERPRETATION OF THE OHIO FAIR TRADE ACT BY THE SUPREME COURT OF OHIO SQUARELY RAISES THE VALIDITY OF THE STATUTE UNDER THE "CONTRACT OR AGREEMENT" PROVISIONS OF THE McGUIRE ACT.

Lilly attempts to avoid joining issue upon the validity of the Ohio Fair Trade Act under the Supremacy Clause by failing to read the statute as interpreted by the Supreme Court of Ohio. Lilly insists that it has not merely given a "notice," but rather that it has given *notice of an express contract.*

The Supreme Court of Ohio has interpreted Section 1333.28(I) which defines "contract" as meaning "any agreement written or oral, or arising from the acts of the parties."

The Supreme Court of Ohio has held:

> "*This provision is the core of the act.* When read in conjunction with the rest of the act, it provides in essence that, *when a retailer with notice that an item has been fair-traded procures it for resale, he is deemed to have entered into an implied contract* with the owner of the trademark that he will sell the item at the fair-trade price." (Jurisdictional Statement at 77.)

The statute of a State means what the Supreme Court of that State *has said* it means. It does not mean what a litigant *would prefer* it to mean. When the essence of the Ohio Fair Trade Act, its "core," is stated by the Supreme Court of Ohio to be the doctrine of *implied contract*, the issues raised by Appellant under Sections 5(a), (2), (3), (4) and (5) are squarely before this Court. The Ohio Fair Trade law is based upon something other than the "contract or agreement" envisaged by the McGuire Act. There is, therefore, no substance to Lilly's attempted avoidance of a joinder upon the basic issues of this case by pleas that its prices are set by an express contract of which it merely gives notice. (Motion to Dismiss 4, 8.)

V. THE "PROPRIETARY INTEREST" CONCEPT OF THE NEW OHIO FAIR TRADE ACT HAS BEEN UTILIZED BY LILLY NOT ONLY TO SET RESALE PRICES, BUT ALSO AS A MEANS OF ENCUMBERING THE BUSINESS PRACTICES OF THE RETAILERS.

The Supreme Court of Ohio has referred to the conception of "proprietary interest" as "the first of the new concepts" embodied in the Fair Trade Law. Revised Code, Section 1333.31 indefeasibly vests the "proprietor" ("shall retain") with a "proprietary interest" in commodities sold by him to distributors. This "proprietary interest" is then made the vehicle for regulating the business practices of "distributors" in the daily conduct of their businesses.

Nothing like this provision has ever been before this Court. As noted, Lilly in Paragraph 6 of its Fair Trade Contract has expressly imposed such restrictions. In *Old Dearborn Distributing Company v. Seagram Distillers Corp.*, 299 U. S. 183 (1936) the statute before this Court permitted only resale price maintenance.

The Ohio statute goes much further. It provides that a notice served upon a remote vendee *without his consent* may nevertheless contain requirements that the vendee, upon resale of the trade-marked goods, must affirmatively exact promises from his customers that such customers will also adhere to the stipulated minimum prices for their level of distribution. Revised Code, Section 1333.29(B)-(2).

Failing to abide by such regulation, he faces the possibility of litigation from every beneficiary of the notice, including (a) the proprietor of the trade mark, and (b) every other person who has either signed a fair trade contract, or (c) who has been served with a notice which also includes a business restriction. Revised Code, Section 1333.29(B)(3).

The Lilly fair trade contract is carefully framed to impose these burdens. Noting in either federal trademark legislation or the common law permits such restrictions on business freedom under the guise of the protection of trademarks.

CONCLUSION.

The Ohio Fair Trade Act as utilized by Appellee in implementing its fair trade program in Ohio has become a forceful and effective tool for the systematic curtailment of Appellant's property rights. Inherent in the program is a rejection of every safeguard against abuse of the antitrust laws written into the McGuire Act. For Lilly to suggest that Appellant's challenge to the constitutionality of the Act in this case is hypothetical, is to deny that which is real and is expressly written into Lilly's Fair Trade program.

The constitutional questions are genuine and substantial. Appellee's motion to dismiss the appeal should be overruled.

Respectfully submitted,

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BRIEF OF APPELLANT.

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OPINIONS BELOW.

The Opinion of the Trial Court in this case (U. R. 371-379),[1] the Court of Common Pleas for Cuyahoga County, Ohio, is not officially reported. It is reported in 1960 Trade Cases, Paragraph 69,778.

The Opinion of the Court of Appeals for Cuyahoga County, including the dissent (U. R. 380-408), is reported in 117 Ohio App. 207 and at 176 N. E. (2d) 236.

The Opinion of the Supreme Court of Ohio, including the dissent (U. R. 413-424), is reported in 174 Ohio St. 487 and at 190 N. E. (2d) 460.

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[1] "U. R." refers to the Record in *Hudson Distributors, Inc. v. The Upjohn Company,* No. 489.

JURISDICTION.

This suit was brought on October 22, 1959 (R. 36) by Hudson Distributors, Inc. ("Hudson"), in the Court of Common Pleas of Cuyahoga County, Ohio, against Eli Lilly and Company ("Lilly") under the Declaratory Judgment Statute of Ohio (Ohio Rev. Code, Secs. 2721.01-2721.15) for a judgment declaring the 1959 Fair Trade Act to be null and void as violative of the Supremacy Clause (Article VI, Clause 2) of, and the Fourteenth Amendment to the Constitution of the United States, and repugnant to various provisions of the Constitution of the State of Ohio.

On July 28, 1960, the Court of Common Pleas of Cuyahoga County held that the Fair Trade Act of 1959 was unconstitutional under the Constitution of Ohio (R. 37-38). The federal constitutional grounds were not reached.

Following Lilly's appeal on August 16, 1960 (R. 38), the Court of Appeals for Cuyahoga County by a vote of 2 to 1 reversed the Court of Common Pleas, and on September 27, 1961 sustained constitutionality (U. R. 411-412). The federal constitutional issues raised by Hudson were disposed of by reliance upon *Standard Drug Company, Inc. v. General Electric Company*, 202 Va. 367, 117 S. E. (2d) 289 (1960) *app. dismissed*, 368 U. S. 4 (1961). The Journal Entry of the Court of Appeals entered September 27, 1961

> "ordered that Sections 1333.27 through 1333.34 of the Ohio Revised Code be and the same hereby are declared to be valid, lawful, and enforceable enactments of the Ohio General Assembly and *not to be in violation of the Constitution of the State of Ohio or of the Constitution of the United States or of any law of the United States* * * *" (R. 42-43). (Italics added.)

On September 29, 1961 (R. 43), Hudson appealed to the Supreme Court of Ohio. On May 8, 1963, the Ohio Supreme Court, without discussing the federal issues, affirmed the judgment of the Court of Appeals for Cuyahoga County by a vote of three Judges in favor of affirmance and four Judges against (U. R. 425).

Although a majority of the Judges held the statute to be unconstitutional, the Ohio Supreme Court could not so hold by reason of Article IV, Section 2 of the Ohio Constitution which requires that, except in affirmance of a judgment below, at least six members of the Supreme Court must be of the opinion that a State Statute is unconstitutional before the Court may so declare (U. R. 424). On May 22, 1963, Hudson filed its Petition for Rehearing in the Ohio Supreme Court, which was denied by the Court on June 12, 1963 (R. 44).

On August 1, 1963, Hudson filed in the Supreme Court of Ohio its Notice of Appeal to the Supreme Court of the United States (R. 44). The Jurisdictional Statement herein was filed on September 24, 1963 and this Court noted probable jurisdiction on December 9, 1963.

The Jurisdiction of the Supreme Court of the United States to review the decision by appeal from the judgment of the Supreme Court of the State of Ohio is conferred by Title 28, United States Code, Section 1257(2).

STATUTES INVOLVED.

The constitutional and statutory provisions involved are the Supremacy Claus (Article VI, Clause 2) of the Federal Constitution; the Due Process Clause of the Fourteenth Amendment of the Federal Constitution; the Miller-Tydings Amendment to the Sherman Act of July 2, 1890, 15 U. S. C. Sec. 1, 50 Stat. 693; the McGuire Act of 1952, 15 U. S. C. Sec. 45(a)(1)-(5), 66 Stat. 632; the Ohio Fair

Trade Act of 1959, Ohio Rev. Code Secs. 1333.27 through 1333.34, 128 Ohio Laws 698. They are printed in Appendix A hereto.

QUESTIONS PRESENTED.

1. Whether the Ohio Fair Trade Act violates the Supremacy Clause of the Federal Constitution in that:

(a) The Act attempts to repeal Section 5(a)(5) of the McGuire Act and Section 1 of the Sherman Anti-Trust Act by authorizing the "proprietor" of a trademark or trade name to establish minimum resale prices for wholesalers with whom the "proprietor" is in competition;

(b) The Act attempts to repeal Section 5(a)(5) of the McGuire Act and Section 1 of the Sherman Anti-Trust Act by authorizing the "proprietor" of a trademark or trade name to compel its distributors to enter into "horizontal" (i.e. at the same level of distribution), price fixing agreements or unlawful boycotting arrangements with other distributors;

(c) The Act attempts to repeal Sections 5(a)(2), (3), (4) and (5) of the McGuire Act and Section 1 of the Sherman Anti-Trust Act by authorizing the "proprietor" of a trademark or trade name, who need not necessarily be the owner thereof, to establish minimum resale prices by notice to distributors without the consensual agreement intended by Congress.

2. Whether the Ohio Fair Trade Act is unconstitutional under the Due Process Clause of the Fourteenth Amendment to the Federal Constitution in that the Act confers upon the "proprietor" of a trademark or trade name a "proprietary interest" in a commodity despite the

sale of and receipt of the full price for such commodity with the trademark or trade name affixed thereon, and by reason of such "proprietary interest," empowers the "proprietor" to compel a remote non-consenting vendee to adhere to a minimum resale price.

3. Whether the federally unconstitutional provisions of the Ohio Fair Trade Act are so commingled and entwined with the remainder of the Act and so inseparable therefrom as to make the entire Act unconstitutional under the Federal Constitution.

STATEMENT OF THE CASE.

A. INTRODUCTION: THE NEW OHIO FAIR TRADE LAW.

On January 23, 1958, the Supreme Court of Ohio nullified the nonsigner clause of the Ohio Fair Trade Act of 1936 (O. R. C., Sec. 1333.07), in *Union Carbide and Carbon Corp. v. Bargain Fair, Inc.*, 167 Ohio St. 182, 147 N. E. (2d), 481. The Court held that the nonsigner provision constituted an unauthorized exercise of the police power, contravened the "due process" provision of the Ohio Bill of Rights by denying the nonsigner the privilege of disposing of his own property on terms of his own choosing, and delegated legislative power to private persons.

On June 29, 1959, the Ohio Legislature enacted a new Fair Trade Law (O. R. C., Secs. 1333.27-1333.34). The purpose of the new statute was to overcome the ruling in *Bargain Fair*. As the exposition of the statute was put in the Ohio House Judiciary Committee (U. R. 210):

> "The Supreme Court, in the Union Carbide case, recognized that if there had been a contract, it would be enforceable. *There will now be a contract arising by the act of the parties, or imposed by statute.*" (Italics added.)

The constitutional infirmity, then, was to be overcome by making "contractors" of all persons who would otherwise be "nonsigners." Gorrell and Brown, *A Re-Examination of Fair Trade Legislation in the Context of the New Ohio Fair Trade Act and the Decision in Hudson Distribs., Inc. v. Upjohn Co.,* (1963) 15 Western Res. L. Rev. 84, 91, 94.

The new statute (Appendix A, at pp. 89 to 96), contains "new concepts" (U. R. 415):

1. "Proprietor" and "Proprietary Interest."

A "proprietor" (Section 1333.28(K)(1)) is defined to include a person who "identifies a commodity" produced by him "by the use of his trade-mark or trade name." The proprietor is vested with a "proprietary interest" in the identified commodity after he has sold it to distributors. Section 1333.31 provides:

> "A proprietor *shall retain* a proprietary interest in any commodity with respect to which he is a proprietor after he has sold it to distributors, so long as such commodity continues to be identified by his trade-mark or trade name, by reason of his interest in stimulating demand for such commodity through effective distribution to ultimate consumers and of his interest in continuing protection of the good will associated with his trade-mark or trade name." (Italics added)

2. "Contract."

Section 1333.28(I) [2] defines "contract" to mean "any agreement, written or verbal, *or arising from the acts of parties.*"

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[2] "'Contract' means any agreement, written or verbal, or arising from the acts of the parties. The establishment by a proprietor of a minimum resale price for any commodity pur-

(Continued on following page)

3. Consideration.

Section 1333.28(I) further defines "a contract and sufficient consideration" for the resale price undertaking. Such contract and consideration consist of the establishment by the proprietor of a minimum resale price for the commodity and the "proprietor's permission" for the distributor to acquire and use the proprietor's interest in the trade-mark or trade name in reselling the commodity.

4. Source of Acquisition as Immaterial to Resale Price Agreement.

Section 1333.28 (I) also creates an agreement between the proprietor and distributor who, with notice of the establishment of a minimum resale price, acquires the commodity directly from the proprietor *or otherwise.*[3]

(*Continued from preceding page*)

suant to the provisions of section 1333.29 of the Revised Code and the proprietor's permission for a distributor to acquire and use the proprietor's interest in the trade-mark or trade name in reselling the commodity shall constitute a contract and sufficient consideration from the proprietor for a promise by the distributor not to sell such commodity at less than the minimum price established by the proprietor. Any distributor (whether he acquires such commodity directly from the proprietor or otherwise) who, with notice that the proprietor has established a minimum resale price for a commodity, accepts such commodity shall thereby have entered into an agreement with such proprietor not to resell such commodity at less than the minimum price stipulated therefor by such proprietor."

[3] The last sentence of the Section provides:

"Any distributor (*whether he acquires such commodity directly from the proprietor or otherwise*) who, with notice that the proprietor has established a minimum resale price for a commodity, accepts such commodity *shall thereby have entered* into an agreement with such proprietor not to resell such commodity at less than the minimum price stipulated therefor by such proprietor." (Italics added.)

5. "Notice."

Notice is defined by Section 1333.28(J) as

> "actual notice given by any method provided in section 1333.30 of the Revised Code, or otherwise established by legally admissible evidence."

Section 1333.30 provides numerous methods for conveying to a distributor notice of the establishment of minimum resale prices, which, following the "acceptance" of a commodity, will create a "contract" pursuant to Section 1333.28(I).[4]

"Conclusive evidence of actual notice" of minimum resale prices is also provided for by Section 1333.30. The third sentence of this section states:

> "The acquisition of or dealing in *merchandise clearly marked*, or enclosed in *containers, packages or dispensers clearly marked*, or the *invoice* for which was clearly marked, with minimum resale prices established by a proprietor shall be conclusive evidence of actual notice of such minimum resale prices." (Italics added.)

Section 1333.30 also provides that a person with actual notice of any applicable minimum resale price is also charged with notice that such a price is subject to change.

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[4] Section 1333.30 provides that actual notice of a stipulated minimum resale price for a commodity may be given to any person (a) by mail, (b) through advertising, (c) through notice attached to merchandise, to containers, packages, or dispensers thereof, (d) on the invoice therefor, or (e) imparted orally.

The deposit in the mails, postage prepaid, of a letter to a distributor specifying minimum resale prices shall constitute prima facie evidence of actual notice to such distributor.

6. Establishment of Minimum Resale Price by Contracts or Notice; and Differentiation at Different Levels of Distribution.

Section 1333.29 contains three Subparagraphs. The first sentence of Subparagraph (A) sets forth two alternative methods "to establish and control" resale prices, by notice to distributors *or* by contract:

> "It shall be lawful, anything in sections 1331.01 to 1331.14 of the Revised Code or otherwise provided in the Revised Code to the contrary notwithstanding, for a proprietor *to establish and control by notice to distributors or by contract,* stipulated minimum resale prices for a commodity of which he is the proprietor and which is in free and open competition with commodities of the same general class produced by others and offered for sale in the same general market area."

Subparagraph (A) further provides for minimum resale price differentiation at various levels of distribution and for the change of such prices.[5]

7. Wholesale and Retail Resale Price Maintenance.

Resale price maintenance at the wholesale level is also authorized *although the proprietor sells to retailers in competition with his wholesale distributors.* The last sentence of Section 1333.29(A) provides:

> "A proprietor may so establish such minimum resale prices for his wholesale distributors, notwithstanding

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[5] The second and third sentences of Section 1333.29(A) provide:

> "Such minimum resale prices may be differentiated as to various levels of distribution, provided such differentiations are not otherwise unlawfully discriminatory. Such prices may be changed from time to time by written notice to distributors who acquired such commodity with notice of any established minimum resale price."

section 1333.34 of the Revised Code, *even though he sells such commodity to retailers in competition with such wholesale distributors*, if such sales to retailers are made at prices not less than those he establishes for such wholesale distributors for comparable sales." (Italics added.)

8. Limitations Upon Channels of Distribution and Marketing Practices by Seller, Distributors and Subvendees.

Subparagraph (B) of Section 1333.29 authorizes the resale price notice or the resale price contract to contain various provisions limiting the buyer's channels of distribution, and imposing limitations and requirements upon both buyer and seller with respect to the resale of the commodity, and the imposition of marketing restrictions upon subvendees.[6]

9. Third Party Beneficiary Provisions.

Section 1333.29(C) provides:

"(C) Any contract or notice authorized by and entered into pursuant to any of the provisions of sections 1333.27 to 1333.34, inclusive, of the Revised Code, shall be for the benefit of the proprietor and any distributor who is bound by a similar contract or notice."

---

[6] "(B) Any such contract or notice may contain the following provisions:

(1) That the buyer will not resell such commodity at less than the minimum resale price stipulated by the proprietor thereof for the level of distribution at which the buyer resells the same;

(2) That the buyer will require from any distributor to whom he may resell such commodity an agreement that such distributor will not, in turn, resell such commodity at less than the minimum resale price stipulated by the proprietor thereof for the level of distribution at which such

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10. Defenses: Removal of Trade-Marks.

Section 1333.33 sets forth various defenses to an alleged violation of Section 1333.32 by a sale below the stipulated minimum resale price. Section 1333.33(D) provides such a defense:

"(D) After the distributor has removed from such commodity *all trace of the proprietor's identifying trade-mark or trade name* and that in such sale or offer to sell or advertisement for sale no statement, representation, or suggestion of any kind is made which would identify such commodity with the trade-mark or trade name of the proprietor." (Italics added.)

Other defenses include the closing out of the distributor's stock of the commodity, the advertisement and sale of second hand or damaged merchandise, and sales by an officer acting under an order of court.

11. Horizontal Price Fixing.

Section 1333.34 prohibits horizontal price fixing "except as otherwise specifically provided in Section 1333.29." Section 1333.34 provides:

"Sections 1333.27 to 1333.34, inclusive, of the Revised Code, shall not, *except as otherwise specifically provided in section* 1333.29 *of the Revised Code*, apply

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distributor resells and that such distributor, if he resells to another distributor, will make the same agreement with the distributor to whom he may sell;

(3) That the seller will require from any other distributor to whom he may sell other items of such commodity an agreement that such distributor will not, in turn, resell such commodity at less than the minimum resale price stipulated by the proprietor for the level of distribution at which such distributor resells and that such distributor, if he resells to another distributor, will make the same agreement with the distributor to whom he may resell."

to any contract, agreement, or understanding between or among producers, or between or among distributors, or between or among wholesalers." (Italics added.)

12. Actions.

By Section 1333.32 (A), sale below the stipulated resale price is made "unlawful and an act of unfair competition," and actions to enforce the statute are authorized. Section 1333.32 is binding upon "any distributor *with notice* that a proprietor has established a stipulated minimum resale price for a commodity of which he is the proprietor *or* * * * any distributor who is *in contract with* a proprietor." (Italics added.)

13. Purpose.

The statute contains, in Section 1333.27, three paragraphs devoted to the purpose of the enactment.[7] Section 1333.27(A) recites that the statute is enacted "in the

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[7] "Sec. 1333.27. (A) Sections 1333.27 to 1333.34, inclusive, of the Revised Code are enacted in the exercise of the police powers of the state and in pursuance of the power specifically granted the general assembly by the people in Section 2 of Article XIII, Ohio Constitution, to regulate the sale and conveyance of personal property, and the purposes of sections 1333.27 to 1333.34, inclusive, of the Revised Code, are generally to protect and preserve small business, to safeguard the good will of trade-marks and trade names, to further wholesome competition, to prevent monopoly in the distribution of goods, and to promote the public welfare by securing wider distribution of commodities and an increase in the production thereof, and thereby reducing production and distribution costs, protecting and increasing gainful employment in manufacturing, wholesaling and retailing, all for the benefit of the consumer and the well-being of the citizens of the state.

"(B) It is the further purpose of sections 1333.27 to 1333.34, inclusive, of the Revised Code, to promote the distribution in commerce in the state of identified merchandise which is in free and open competition with other articles of the same general class. Where fair, equitable, and competitive prices cannot be

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exercise of the police power of the state" as well as pursuant to the constitutional authority of the General Asssembly to regulate the sale and conveyance of personal property.

Section 1333.27(B) also states as a purpose, the maintenance of "fair, equitable and competitive prices * * * in all appropriate stages in the distribution of * * * identified merchandise * * *."[8]

The new Fair Trade Act became effective on October 22, 1959 after having been passed over the veto of Governor DiSalle. (Amended Petition, U. R. 5.)

B. INCEPTION OF LITIGATION; STIPULATIONS OF ISSUES AND EVIDENCE.

This action was brought on October 22, 1959 (R. 36), the effective date of the Ohio Fair Trade Law, under the Declaratory Judgment Act of Ohio (Ohio R. C., Sections 2721.01 et seq.). By amended petition of January 11,

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maintained in all appropriate stages in the distribution of such identified merchandise, the marketing of such merchandise is depressed and the quantity thereof moving in the channels of commerce in the state declines.

"(C) To remove obstructions to the marketing of identified merchandise in commerce which are occasioned by unfair selling practices, it is the policy of the state to afford distributors of identified merchandise an effective means whereby the sale of such merchandise at all appropriate stages of distribution may be consummated at prices adequate to stimulate distribution and low enough to enable distributors of such identified merchandise to compete effectively with those marketing other goods, who by size and dominance may distribute such goods through their own retail outlets or by franchise or consignment methods, and to satisfy the needs of ultimate consumers."

[8] It states in part:

"Where fair, equitable, and competitive prices cannot be maintained in all appropriate stages in the distribution of such identified merchandise, the marketing of such merchandise is depressed and the quantity thereof moving in the channels of commerce in the state declines."

1960, Hudson asked for a declaration of its rights under the new Act, and prayed that the Act be declared invalid as contravening the Constitutions of the State of Ohio and of the United States (R. 1-7). Lilly answered asserting the validity of the new Ohio Fair Trade Act, and cross-petitioned for affirmative relief against Hudson under the Act (R. 7-18).

The case was submitted to the Court of Common Pleas of Cuyahoga County upon the pleadings, an Agreed Statement of Facts (R. 19-22), evidence introduced by stipulation [9] (R. 13), and upon briefs of counsel. By agreement between the parties the case was submitted solely on the question of the constitutionality of the Act; there was not submitted the question of the relief to which Lilly would be entitled under the Act if it were upheld.

The Record shows that Lilly produces pharmaceuticals and other commodities (R. 19-20). Hudson owns and operates a retail store in which it sells pharmaceuticals produced by Lilly (R. 19).

Lilly sells its products in interstate commerce (R. 19-20). Lilly sells its products to wholesalers only, in Ohio and throughout the United States; it does not sell

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[9] By this stipulation, the evidence consisted of:

On behalf of Hudson, affidavits of Bernard Shulman, President of Hudson, Ernest C. T. Santora, member of the law firm which is counsel for Hudson, Professor S. Sterling McMillan, Professor of Economics at Western Reserve University, copies of the Lilly Digest for the years 1956 through 1958, and price lists of Eli Lilly and Company effective respectively January 2, 1956, May 6, 1957 and January 5, 1959.

On behalf of Lilly, Transcript of Hearings before the respective Judiciary Committees of House of Representatives and Senate of the Ohio Legislature, affidavit of J. H. Rushton, Manager, Accounting Analysis Department, and affidavit of William R. Hutchinson, Lilly Director of Sales, Eastern Central Region.

Both parties waived the right to object to the competency of the evidence, but reserved the right to object to the materiality or relevancy.

directly to any pharmaceutical retailers (R. 19-20). Lilly's commodities are manufactured under its trade-mark, trade name or brand name, and are in free and open competition with commodities of the same general class produced by others and sold in the same general market areas in Ohio (R. 20).

Lilly has maintained a policy of establishing minimum wholesale and retail resale prices for commodities pursuant to state fair trade laws, where such exist (R. 20). Such minimum retail resale prices for Lilly commodities are established by written contracts with numerous retail pharmaceutical outlets in Ohio, 1,420 such contracts having been signed in Ohio, encompassing 65 per cent of the retail pharmaceutical outlets in the State of Ohio. About 50 per cent of the retail pharmaceutical outlets in the Cleveland area entered into such fair trade contracts (R. 24).

Hudson buys Lilly products in interstate commerce for retail sale in Ohio. Hudson buys from Regal D. S., Inc., a warehouse company engaged in the sale of drugs and cosmetics to Hudson and other companies affiliated with Hudson (Shulman Affidavit, R. 25). Such Lilly products are sold by Regal D. S., Inc. to Hudson as part of Regal's regular course of business in interstate commerce, and Hudson purchases Lilly products in anticipation of resale to the consuming public (Shulman Affidavit, R. 25). Hudson's purchases from Regal D. S., Inc. are made at regular weekly intervals, with shipments of Lilly products being made regularly to Hudson from Michigan into Ohio (Shulman affidavit, R. 25).

Hudson sells Lilly products at the same percentage markup over costs as it sells all other products (Shulman Affidavit, R. 25), notwithstanding notification to Hudson from Lilly of higher minimum resale retail prices for the commodities bearing Lilly's trademarks and trade names (R. 21-22).

Hudson has not entered into any written contract with Lilly to sell its products at the prices fixed by Lilly (R. 22). On the contrary, it has always been Hudson's policy to sell products at prices which produce a reasonable profit (Shulman Affidavit, R. 25).

Hudson does not engage in "loss leader merchandising" or "bait advertising" of any kind (Shulman Affidavit, R. 25). There have been no price wars in the City of Cleveland or its environs (Shulman Affidavit, R. 26), nor has Hudson attempted to monopolize the retail drug field (Shulman Affidavit, R. 26). The beneficiary of Hudson's method of doing business is the public (Shulman Affidavit, R. 27) which, as a result of Hudson's methods of operation, is able to purchase drugs and pharmaceuticals produced by Lilly in a wider market at a reasonable price (Shulman Affidavit, R. 27).

C. ASSERTIONS AND DENIAL OF INJURY TO LILLY.

By allegation (R. 9) and affidavit (Rushton, R. 32; Hutchinson, R. 33-35) Lilly argued that Hudson had caused it irreparable injury.

The Rushton Affidavit (R. 32) contrasted trends of sales nationally, in Ohio and in Cleveland for the years 1957 through 1959.[10]

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[10] "6. The percentage increases or decreases of the sales of these product lines for the year 1958 over the year 1957 to wholesalers nationally, in Ohio and in Cleveland are as follows:

Product Line	Trend of Sales Nationally	Trend of Sales In Ohio	Trend of Sales In Cleveland
Iletin	—3.9%	— 7.9%	— 8.2%
Vitamins	3.6	— .7	— 5.7
V-Cillin	—7.1	—13.5	—12.3
Ilotycin-Ilosone	28.4	21.6	7.6

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The Hutchinson Affidavit (R. 35) emphasized that injury to Lilly's distribution system through injury to its retail pharmaceutical outlets would result in a decrease of sales; that the action of Cleveland retail pharmaceutical outlets in no longer displaying and promoting Lilly commodities by reason of the unfair competition of Hudson has contributed to the decrease of Lilly sales generally in the Cleveland area in the "kind of commodities which are sold by plaintiff." Hutchinson also stated that by reason of the differing prices for Lilly commodities in the Cleveland area, complaints have been received, confusion in the consumers' minds has been caused as to the "true value" of the commodity, and Lilly has suffered a loss of good will with the buying public.

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7. The percentage increases and decreases of the sales of these product lines for the year 1959 over the year 1958 to wholesalers nationally, in Ohio and in Cleveland are as follows:

Product Line	Trend of Sales Nationally	Trend of Sales In Ohio	Trend of Sales In Cleveland
Iletin	3.2%	1.7%	— 3.5%
Vitamins	4.8	4.0	— 5.6
V-Cillin	— 8.3	— 8.6	—12.3
Ilotycin-Ilosone	24.0	31.3	37.8

8. The percentage increases or decreases of the sales of all pharmaceuticals produced by Eli Lilly and Company (including the four product lines specified above) for 1958 over 1957, and for 1959 over 1958 to wholesalers nationally, in Ohio and in Cleveland are as follows:

	Trend of Sales Nationally	Trend of Sales In Ohio	Trend of Sales In Cleveland
1958 over 1957—all products	—13.5%	—13.9%	—22.0%
1959 over 1958—all products	6.3	7.3	3.9"

J. H. Rushton.

By way of response to the foregoing, Hudson argued (Shulman, R. 24-25) that the activities of affiant have been beneficial to Lilly; that during the years in which affiant has been active in the retail drug business, Lilly's sales in Cleveland, Ohio, and in the nation, have increased steadily; that national sales increased from $119,670,000.00 in 1950 to $199,800,000.00 in 1957, with a slight decrease in the business recession year of 1958 to $180,470,000.00, with a rise again in 1959 to $187,010,000.00. These increases have occurred although fair trade statutes have not been enacted or are not enforceable against nonsigners in some twenty (20) states and in the District of Columbia.

D. LILLY NOTIFIED HUDSON OF THE EXECUTION OF ITS "MANUFACTURER-RETAILER FAIR TRADE CONTRACT" AND REQUIRED COMPLIANCE THEREWITH.

On October 1, 1959, Lilly notified Hudson of its vigorous support of fair trade and invited entry by Hudson into its "standard form" Fair Trade Contract (R. 11).

On December 10, 1959, Lilly sent Hudson its "warning letter" (R. 15) and enclosed "for your information" duplicate copies of the Lilly "Fair Trade contract which has been signed by a substantial number of retail druggists in the State of Ohio and in your community and which is now in full force and effect." "Under the provisions of these contracts," Lilly pointed out, it had established minimum retail resale prices for its trade-marked commodities, and had furnished Hudson with a Lilly price list. Lilly admonished Hudson that it was required to adhere to the minimum retail resale prices.

Lilly concluded its December, 1959 warning letter:

> "We trust that your future operations will be strictly in accordance with the obligations imposed upon you under the Ohio Fair Trade Act, so that there

will be no occasion for any further controversy or litigation." (R. 16).

On January 26, 1960, Lilly sent a second warning letter to Hudson and stated:

> "It is our policy to employ all reasonable means to require the uniform observance of the minimum retail resale prices which we have established, and in our general enforcement policy we are prepared to file suits for injunctions where *contract violations* cannot be adjusted on a voluntary basis.
>
> "We trust that your future operations will be *in accordance with your obligations under the contracts and under the Ohio Fair Trade Act,* so that there will be no occasion for further controversy or litigation." (R. 17-18) (Italics added).

E. RULING BY THE SUPREME COURT OF OHIO.

The Opinion in the Supreme Court of Ohio by the minority of three of seven Judges did not discuss the permissible scope of either state fair trade legislation or fair trade contracts under the federal enabling legislation. The Opinion was concerned solely with the validity of the new Fair Trade Act under the laws of Ohio.

The Opinion referred to "the implied contract doctrine" of Section 1333.28(I) as "the heart of the new act." The Opinion characterized the law as "regulating the sale and conveyance of personal property" pursuant to Section 2, Article XIII of the Ohio Constitution. The Opinion also noted that the new act was "much more comprehensive" than the prior law and "introduces into the law two entirely new concepts." (U. R. 415.)

(i) The first of the new concepts is *the retention by the proprietor of a proprietary interest following the sale* of the commodity to distributors (Section 1333.31). The Opinion noted that the General Assembly has extended

the original concept of the trade-mark to include as part of the ownership of the mark, a continuing proprietary interest in the trade-mark or trade name on the merchandise "to the extent that the proprietor can control the resale prices of the merchandise even after it has left his possession or ownership." (U. R. 416.)

The Opinion held that the General Assembly determined that such "extension of proprietary rights" was necessary not only to protect the property rights in the ownership of a trade-mark or trade name, but also to protect the small businessman and the public in general. In the absence of conclusive evidence to the contrary, the legislative determination would stand. (U. R. 417.)

(ii) The second of the new concepts is set forth in Section 1333.28(I) defining *"contract."* The Opinion quoted the entire definition, including the second sentence referring to the establishment of a minimum resale price and "the proprietor's permission for a distributor to acquire and use the proprietor's interest in the trade-mark" in reselling the commodity as constituting "a contract and sufficient consideration" for the resale price maintenance undertaking by the distributor. (U. R. 417.)

The Opinion held this provision to be "the core of the act" and interpreted the Section as providing

> "in essence that, when a retailer with notice that an item has been fair-traded procures it for resale, he is deemed to have entered into an implied contract with the owner of the trademark that he will sell the item at the fair-trade price.
>
> There is no question that express price maintenance contracts are valid. *Garst v. Harris,* 177 Mass., 72; *Grogan v. Chaffee,* 156 Cal., 611." (U. R. 417.)

The Court went on to state:

> "The statute creates an implied contract by act of the parties. The doctrine of implied contracts is almost

as old as the law of contracts. *The simple illustration of the appellees that, where one takes a candy bar from a grocer's shelf and eats it, he obligates himself to pay for it is a basic example of an implied contract by act.* No word need be said; conduct creates the contract." (U. R. 418). (Italics added.)

(iii) The Opinion further noted that there was no compulsion on a retailer to handle the trade-marked goods, and cited and relied upon the Opinion of this Court in *Old Dearborn Distributing Co. v. Seagram-Distillers Corp.*, 299 U. S. 183, 193, 194 (1936). If the retailer selects the fair trade goods, he must abide by the conditions imposed thereon by the proprietor.

The Court noted the analogy to the purchase of a home where

> "there are in most instances, restrictive covenants as to use. We may not like such conditions, but if we accept the contract we must abide thereby. Liking or not liking the conditions of acquiring property has no effect on the validity of the contract." (U. R. 418.)

(iv) With reference to goods coming into Ohio from out of state, the Court stated that:

> "Once trademarked goods come into Ohio the law imposes certain conditions thereon, and they are held subject to those conditions." (U. R. 419.)

The Court also stated:

> "Under the Ohio law, the owner of the trademark, once the goods enter into Ohio, has by statute sufficient interest to control the resale price of the goods." (U. R. 419.)

(v) The Opinion also considered whether the "conditions and controls" set forth in the recitals of legislative purposes in Section 1333.27 are "within the police power as declared by the General Assembly." The Opinion found

such basis in the preservation of small independent merchants.

The Opinion also found that the owners of trademarks have discovered that "discount selling of their products eventually cheapens them in the eyes of the public with the ultimate effect of injuring the value of the trademark or trade name and reducing their total sales." It was therefore concluded:

> "When the general welfare of the small merchant is considered together with the necessity of protecting the goodwill and value attached to a trademark, it was clearly within the legislative power to enact such protective legislation, and the court will not substitute its judgment in this instance for that of the General Assembly." (U. R. 422.)

The Opinion also held that there was no unconstitutional delegation of legislative power as to price fixing, or violation of the constitutional right of one to sell his own property on his own terms. Since "the implied contracts herein are valid, the retailer takes the goods on the conditions of the offer and thus voluntarily agrees to comply with the fair-trade price."

The Opinion accordingly held:

> "It is the intention of the new act to declare and protect the proprietary interest of a manufacturer in his trademark and the goodwill attached to it. * * * The means employed by the act is the long and well established legal doctrine of implied contract. None of the constitutional attacks on this new act have merit." (U. R. 423-424.)

The majority of the Judges of the Ohio Supreme Court dissented since the new Fair Trade Act attempts arbitrarily to bind nonsigners of price-fixing contracts and undertakes to control the price of seller's trade-marked merchandise by purchasers "who bear no relationship

whatsoever to the producers of such merchandise." (U. R. 424.)

The minority Opinion of the Supreme Court never adverted to any issues concerning federal-state relationships in price fixing by private persons in interstate commerce.

F. THE MINORITY OPINION OF THE OHIO SUPREME COURT DOES NOT SETTLE THE LAW IN THE STATE, AND CONTRARY DECISIONS REMAIN IN FULL FORCE AND EFFECT IN THE SECOND AND THIRD MOST POPULOUS COUNTIES OF OHIO.

By reason of the Opinion by a minority of the Judges in the Supreme Court of Ohio, the law in the State remains in doubt. The constitutionality of the fair trade law remains open for decision by the various Courts of Appeals in Ohio.[11]

The decision in the case at bar in the Court of Appeals for the Cleveland area could not be reversed by the majority of the Judges of the Ohio Supreme Court. In other Ohio counties final judgments have been entered holding the entire Fair Trade Act to be unconstitutional. *Helena Rubinstein v. Cinci Vitamin & Cosmetic Distributors, Inc.*, 84 Ohio L. Abs. 143, 167 N. E. 2d 687 (Common Pleas, Hamilton County [Cincinnati], 1960) and *Bulova Watch Co., Inc. v. Ontario Stores of Columbus, Inc.*, 86 Ohio L. Abs. 585, 176 N. E. 2d 527 (Common Pleas, Franklin County [Columbus], 1961) affirmed without opinion by the Court of Appeals for Franklin County on June 19, 1962.

On the ground of the unconstitutionality of the statute, the Franklin County Court of Appeals in nine

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[11] Pogue, *Hudson Fair Trade Case—The Need for Constitutional Amendment* (1963), 12 Clev-Mar. L. Rev., 513.

companion appeals, affirmed judgments of the Court of Common Pleas below which had sustained demurrers to and dismissed fair trade petitions filed by various drug and cosmetic manufacturers. *Mead Johnson & Co. v. Columbus Vitamin & Cosmetic Distributors, Inc.*, 1962 Trade Cases, Par. 70,360.

In the *Bulova Watch* case, the Court of Common Pleas of Franklin County held the statute to be repugnant to the Miller-Tydings Act and the McGuire Act, hence unconstitutional under the Supremacy Clause of the United States Constitution. The Court of Appeals for Franklin County affirmed. Both the *Helena Rubinstein* and *Bulova Watch* decisions remain in full force and effect in the second and third most populous counties in Ohio.

Only two propositions remain clear in the fair trade law of Ohio:

(1) A non-signer clause in a fair trade law is unconstitutional. *Union Carbide & Carbon Corp. v. Bargain Fair Inc.*, 167 Ohio St. 182, 147 N. E. 2d, 481 (1958).

(2) Hudson, which would be a "non-signer" under the prior 1936 law is, by the 1959 law, "transformed" into a "contractor."[12] There are no longer "signers" or "non-signers" under the law of Ohio.

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[12] "Anyone who purchases goods with knowledge of the established resale price enters into a contract with the proprietor not to sell the goods for less than the established prices while using the proprietor's trademark. Therefore, by the employment of the elementary principles of offer and acceptance, the legislature has provided that a retailer enters into a contract with a proprietor when he purchases goods bearing the proprietor's trademark with knowledge that the proprietor has established resale prices for his goods. The proprietor thus establishes minimum resale prices as a condition for the use of his good will as an aid in the resale."

Gorrell and Brown, *A Re-Examination of Fair Trade Legislation in the Context of the New Ohio Fair Trade Act and the Decision in Hudson Distributors, Inc. v. Upjohn Co.*, 15 West. Res. L. Rev., 84, at 91.

SUMMARY OF ARGUMENT.

The nonsigner clause of the 1936 Ohio Fair Trade Law was held to be unconstitutional by the Supreme Court of Ohio in January, 1958, in *Union Carbide & Carbon Corp. v. Bargain Fair, Inc.*, 167 Ohio St. 182, at 186. The formulation of the 1959 Ohio Fair Trade Law (O. R. C., Sec. 1333.27 to Section 1333.34) was undertaken with a view to making all persons handling "fair-traded" merchandise "parties to the stipulated-price contract." As the legislative history shows (U. R. 210) "there will now be a contract arising by act of the parties, or imposed by statute."

I. Appellant is entitled to be free from price fixing arrangements in the course of interstate commerce pursuant to state legislation which does not conform with the Miller-Tydings Act and the McGuire Act. Schwegmann Bros. v. Calvert Distillers Corp., 341 U. S. 384 (1951); Esso Standard Oil Company v. Secatore's Inc., 246 F. 2d 17 (C. A. 1st, 1957).

Exemptions from the antitrust laws for price fixing "contracts or agreements" in interstate commerce pursuant to state enabling legislation authorized by the Miller-Tydings and the McGuire Acts are in derogation of the fundamental national policy expressed in the antitrust laws and must be strictly construed. In *United States v. McKesson and Robbins, Inc.*, 351 U. S. 305, 316 (1956), this Court held that:

> "* * * Congress has marked the limitations beyond which price fixing cannot go. We are not only bound by those limitations but we are bound to construe them strictly, since resale price maintenance is a privilege restrictive of a free economy."

Moreover, state legislation enacted pursuant to permissive enabling federal legislation must be of the kind contemplated by the Congress before exemption from federal antitrust statutory or administrative regulation may be accomplished. *F. T. C. v. Travelers Health Assn.*, 362 U. S. 293 (1960); *Grand Jury Investigation of Aviation Insurance Industry*, 183 F. Supp. 374 (S. D. N. Y., 1960).

Lilly drugs and pharmaceuticals sold by retail pharmacies over the counter and by prescription are "in the stream" of interstate commerce. *Cf. Northern California Pharmaceutical Assn. v. United States*, 306 F. 2d 379 (C. A. 9, 1962) *cert. den.*, 371 U. S. 862 (1962); *United States v. Utah Pharmaceutical Assn.*, 201 F. Supp. 29 (D. Utah, 1962). Over 90% of the prescriptions sold are dispensed by the pharmacists as precompounded by the manufacturer, without any significant change in form. 306 F. 2d at 386; 201 F. Supp. at 32.

II. Lilly has demanded that Hudson adhere to an illegal boycotting and price fixing combination established by its Manufacturer-Retailer Contract.

The establishment by written contract of retail resale prices, and the giving of notice thereof is the fair trade method Lilly has adopted under the Ohio Fair Trade Law (R. 4). Lilly has demanded that Appellant conduct its future operations "in accordance with the obligations under the contracts and under the Ohio Fair Trade Act * * *" (R. 18), 1420 of which were entered into in the State of Ohio (R. 24).

A. *The contract of which notice was given by Lilly, and to the terms of which Lilly demands adherence by Appellant, contains provisions authorized by neither the Miller-Tydings nor by the McGuire Act.* The Contract states in part:

> "6. Retailer agrees not to knowingly sell any of Manufacturer's Identified Commodities to any dealer who fails to observe the minimum retail resale prices established under Paragraph 3 hereof." (R. 13.)

Each and every retailer to whom a similar notice of the Lilly contract is given, whether or not a signer, is bound by and is in turn the beneficiary of every other such contract of notice. O. R. C. Sec. 1333.29(C). Consequently, every retailer with notice is bound to refuse to deal with any other retailer who, in the language of Paragraph 6 of the Contract, "fails to observe the minimum retail resale prices established under Paragraph 3 hereof."

B. *Combinations may not be formed to create, enforce or secure adherence to fair trade prices. United States v. Bausch and Lomb Optical Co.*, 321 U. S. 707 (1944); *United States v. Frankfort Distilleries, Inc.*, 324 U. S. 293 (1945).

The requirements for an unlawful combination have been amply satisfied, as this Court held in *United States v. Parke, Davis and Company*, 362 U. S. 29, 46-47 (1960):

> "But if a manufacturer is unwilling to rely on individual self-interest to bring about general voluntary acquiescence which has the collateral effect of eliminating price competition, and takes affirmative action to achieve uniform adherence by inducing each customer to adhere to avoid such price competition, the customers' acquiescence is not then a matter of individual free choice prompted alone by the desirability of the product. The product then comes packaged in a competition—free wrapping—a valuable feature in itself—by virtue of concerted action induced by the manufacturer. The manufacturer is thus the organizer of a price-maintenance combination or conspiracy in violation of the Sherman Act."

Lilly's fair trade contract also violates Section 5(a) (5)[13] of the McGuire Act. Half of the pharmacies in Cleveland have signed the Lilly contract (R. 24). When Lilly gave notice of its fair trade contracts to Appellant and demanded that Appellant's future operations be "in accordance with the obligations under the contracts and under the Ohio Fair Trade Act, * * *," it was giving notice of, and attempting to bind Appellant to an unlawful and unenforceable contract.

The inclusion of boycotting provisions in a fair trade contract renders the contract unenforceable. The National Wholesale Druggists' Association, *The Basis and Development of Fair Trade* (3rd Ed., 1955) 96-97.

III. The Ohio statute is a fundamental departure from the intent and purpose of the statutory "contract or agreement" system authorized by the Miller-Tydings and McGuire Acts. Its origin and purpose are derived from proposed Congressional legislation designed to jettison the resale price maintenance methods presently authorized.

A. *The Ohio statute is based upon the retention, by fiat of resale price maintenance statute, of a "proprietary interest" in the commodity which is the subject of resale*

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[13] Sec. 5(a) (5) provides:

"Nothing contained in paragraph (2) of this subsection shall make lawful contracts or agreements providing for the establishment of maintenance of minimum or stipulated resale prices on any commodity referred to in paragraph (2) of this subsection, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other."

price maintenance. This statutory device was originated in 1957 in MacLachlan, *A New Approach to Resale Price Maintenance* (1957) 11 Vanderbilt L. Rev. 145.[14]

It was the purpose of the proposed MacLachlan legislation to enact a *federal* resale price maintenance law based upon trade-marks in commerce. With its conception of "proprietary interest," the MacLachlan legislation would also "organize the market" for the trade-marked commodity at every level of distribution, on a national basis. J. A. MacLachlan, *Hearings on H. R. 10527 (Harris Bill)* etc. (1958), Eighty-Fifth Cong., Second Sess., 265.

The impetus for the proposed legislation arose from the conviction in Congress that, by the end of 1957 the "contract" method of maintaining fair trade prices had failed.[15] Many State Supreme Courts had declared the nonsigner provisions unconstitutional. This Court's ruling in *United States v. McKesson and Robbins, Inc.*, made

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[14] A chart of sources of various provisions of the 1959 Ohio Fair Trade Law appears at the conclusion of "Summary of Argument."

[15] H. Rep. No. 467, 86th Cong., 1st Sess., on H. R. 1253 (Harris Bill), 4-7, June 9, 1959. As of March 1, 1958, the Supreme Court of 13 states had declared the nonsigner clauses of their respective fair trade laws invalid:

Arkansas	Kentucky	Oregon
Colorado	Louisiana	South Carolina
Florida	Michigan	Utah
Georgia	New Mexico	
Indiana	Ohio	

The Supreme Courts of two states voided their entire fair trade acts; Nebraska and Virginia (reenacted March 1, 1958). These states joined with Missouri, Texas, Vermont and the District of Columbia as areas that had no fair trade acts. *Hearings on H. R.* 10527 (*Harris Bill*) etc., (1958) Eighty-fifth Congress, Second Session, 407 *Testimony of Herman S. Waller*, Counsel, National Association of Retail Druggists.

(Continued on following page)

clear that horizontal price fixing between a dual-distributing manufacturer and his wholesalers was prohibited. By the rulings in the Courts of Appeals for the Second and Fourth Circuits in *General Electric Company v. Masters Mail Order Co. of Washington, D. C.*, 244 F. 2d 681 (C. A. 2d, 1957), *cert. den.* 355 U. S. 824 (1957), and *Bissell Carpet Sweeper Co. v. Masters Mail Order Co. of Washington, D. C., Inc.*, 240 F. 2d 684 (C. A. 4, 1957), it was held lawful for a mail order discount house, by consummating the sale of commodities in a nonfair trade state, to sell fair-traded merchandise at a discount in a fair trade state.

Moreover, many fair traders found burdensome the interpretations of Section 1 of the Sherman Act enunciated by this Court—applicable to *intrabrand* as well as to *interbrand* competition—that a combination or boycott instituted by a manufacturer and his distributors which sought to create, maintain or extend price fixing, with or without benefit of fair trade, was unlawful under Section 1 of the Sherman Act, *United States v. Bausch and Lomb Co.*, 321 U. S. 707 (1944); *United States v. Frankfort Distilleries, Inc.*, 324 U. S. 293 (1945); *United States v. Parke, Davis and Co.*, 365 U. S. 125 (1961).

The proposals of Professor MacLachlan were carried over into the Harris Bills upon which hearings were held

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(Continued from preceding page)

Fair Trade has now become constitutionally inoperative against nonsigners in over twenty states. Additionally, six states have no laws at all. Trade Reg. Rep., Pars. 6017, 6041; Alexander, *Quality Stabilization and the Crisis in Fair Trade* (1963) 51 Georgetown L. J. 783; H. Rep. 2352, 87th Cong., 2d Sess., on H. J. Res. 636 ("Quality Stabilization") 6-9, Sept. 12, 1962; H. Rep. No. 566, Eighty-eighth Cong., First Sess., on H. R. 3669 ("Quality Stabilization") 5-6, July 22, 1963.

in 1958 and 1959 by the Congress,[16] and which were favorably reported upon by the House Committee on Interstate and Foreign Commerce.[17] None of these bills was ever enacted into law.

B. *The MacLachlan proposal, the Harris Bills and the Ohio Statute are based upon fundamental proposals relating to commerce upon which Congressional action is required, and which are wholly beyond the scope of the state legislation authorized by the Miller-Tydings and McGuire Acts.*

The MacLachlan proposal and every variation of the Harris Bill, including the Ohio Fair Trade Law of 1959 contain the basic provisions envisaged by Professor MacLachlan's suggested new approach:

1. Retention of a "proprietary interest" in the commodity by the proprietor of the trademark, brand or trade-name; and the giving of notice of such proprietary interest by the "proprietor."

2. Renunciation of *United States v. McKesson and Robbins, Inc.*, by permitting resale price maintenance by notice at the wholesale level by the "pro-

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[16] Hearings on such legislation were as follows: *Hearings Before a Subcommittee on the Committee on Interstate and Foreign Commerce*, House of Representatives, Eighty-fifth Congress, Second Session on H. R. 10527, H. R. 10770, H. R. 10847, H. R. 11048, H. R. 11216, and H. R. 11264, April 29, 30, May 1, 6, and 7, 1958; *Hearings Before the Committee on Interstate and Foreign Commerce*, House of Representatives, Eighty-sixth Congress, First Session, on H. R. 768, H. R. 1253, H. R. 2463, H. R. 2729, H. R. 3187, H. R. 5252, and H. R. 5062, March 16, 17, 18, 19, 20, 23, 24, and 25, 1959; *Hearings Before a Special Subcommittee on Fair Trade of the Committee on Interstate and Foreign Commerce*, United States Senate, Eighty-sixth Congress, First Session on S. 1083, June 15, 16, and July 10, 1959.

[17] House Rep. No. 467, Eighty-sixth Congress, First Session, June 9, 1959.

prietor," although he sells in competition with wholesalers, so long as he sells at the applicable price established for comparable sales by distributors.

3. A legislative repeal of the "Masters Discount Mail Order House" cases by making unlawful the sale below "fair trade" price by any person with actual notice of the establishment of a resale price by the proprietor; and, by such provision, assisting in thwarting the "diversion" of merchandise by means of interstate sales by discounters.

4. By direct statutory provision, or by implication, promoting cooperation by all distributors of merchandise of the same proprietor sold under the same mark in maintaining stipulated or minimum prices established by the proprietor.

The 1959 Ohio Fair Trade Law contains each and every of the foregoing provisions.[18]

In accordance with its recited objective of maintaining prices "in all appropriate stages in the distribution" of goods in the course of commerce, the Ohio Fair Trade Law authorizes an unlawful "organization of the market" at all levels of distribution by state authorized boycott, by unlawful horizontal price-fixing and by the attempted binding of third persons by notice of an unwarranted "proprietary interest" unlawfully created by the Ohio Legislature.

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[18] The substance of the first three provisions also appears in variations of the "Quality Stabilization" bills reported on by the House Committee on Interstate and Foreign Commerce. H. Rep. No. 2352, 87th Cong., 1st Sess. (1962); H. Rep. No. 566, 88th Cong. 1st Sess. (1963). These bills retain the "proprietary interest" in the *trade-mark, brand or trade-name,* rather than in the *commodity.*

IV. The Congress, the Virginia Courts and the common law recognize that a "contract" may not be imposed by a "notice statute" upon a non-consenting third party.

A second source for various provisions of the 1959 Ohio Fair Trade Law was the Virginia Fair Trade Act of 1958. Code of Virginia, 1950, as amended, Sections 59-8.1 to 59-8.10. This statute is a "notice" statute. Section 59-8.2(10) defines "contracts" to provide that "acceptance for resale with actual notice shall be deemed to be assent to the terms of the 'contract.' "

The Virginia Courts had previously held that the nonsigner clause of the prior Virginia Fair Trade Law was ineffective. *Benrus Watch Co., Inc. v. Kirsch*, 198 Va. 94, 92 S. E. (2d) 384 (1956). Following the enactment of the new statute, the Virginia Courts have held:

> 1. The "notice contract" statute is valid between trade-mark owner and direct purchaser. *Standard Drug Co., Inc. v. General Electric Co.*, 202 Va. 367, 117 S. E. (2d) 289 (1960).
>
> 2. Such a "contract by notice" *cannot* be effective between the trade-mark owner and third parties who acquire merchandise from a third person, e.g., an intervening wholesaler, who made no resale price maintenance contract with the purchaser. Otherwise the invalid nonsigner clause would be reinstituted. *Bulova Watch Company, Inc. v. Zale-Norfolk, Inc.*, No. 2570, Court of Law and Chancery, Norfolk, aff'd without opinion, Supreme Court of Virginia, March 1, 1962, Appendix B, p. 102 hereto.

With specific reference to the Virginia statute, the Congress of the United States has recognized that such a "contract by notice" statute under the federal enabling legislation is ineffective unless the McGuire Act be

amended to permit resale price maintenance by "notice" as well as by "contract or agreement." The Harris Bill proposed such amendments to Section 5(a) (2), (3) and (4) of the McGuire Act. H. Rep. 467, Eighty-sixth Cong., First Sess. (1959) at 18.

The view of the Virginia Courts in *Zale-Norfolk* is in accord with the common law. *Garst v. Hall & Lyon Co.*, 179 Mass. 588, 61 N. E. 219 (1901).

V. The Ohio Fair Trade Law frustrates the basic national policy expressed in the Lanham Act by creating a "proprietary interest" in a trade mark on goods in commerce, and the basic national policy expressed in the Federal Food, Drug, and Cosmetic Act by authorizing the removal of labels on drugs in commerce.

The Ohio Fair Trade Law frustrates basic national trade mark policy by creating a "proprietary interest" in commodities in commerce. Such a "proprietary interest" is basic to the operation of the Ohio "implied contract" theory of fair trade law, approved by the Supreme Court of Ohio in this case. (U. R. 417, 418, 423.)

Such an interference with trade-marks in commerce is contrary to the federal preemption of trademarks in commerce, expressed by Congress in the Lanham Act.[10]

The 1959 Ohio law also creates a defense to the attempted enforcement of a fair trade contract by permitting the removal of a trade-mark (Section 1333.33 (D)). Such a removal is contrary to the national policy ex-

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[10] 15 U. S. C. Section 1127, 60 Stat. 44, Lanham Act, states in part:

> "The intent of this chapter is to regulate commerce within the control of Congress by making actionable the deceptive and misleading use of marks in such commerce; to protect registered marks used in such commerce from interference by State, or territorial legislation. * * *"

pressed by the provisions of the Federal Food, Drug, and Cosmetic Act, 21 U. S. C., Section 331(k), 67 Stat. 631.[20]

VI. The Lilly "notice contract" with appellant violates Section 1 of the Sherman Act.

The Lilly resale price maintenance structure in Ohio originates and finds its place in an unlawful statutory scheme which is wholly beyond the federally authorized scope of state fair trade enabling legislation. The scheme originates in an impermissible "proprietary interest" retention upon commodities in commerce, which is sought to be combined with an impermissible "notice contract."

The Ohio legislation seeks to renounce the "contract or agreement" system created by the Miller-Tydings and McGuire Acts. It seeks to solve for "fair traders" the marketing problems they felt were generated by the decisions of this Court and of State Supreme Courts. In the interest of this "orderly," price-controlled fair trading at all levels of distribution, the Ohio Legislature has authorized contracts or arrangements totally at variance with basic antitrust objectives, to wit, horizontal price-fixing among competitors, and boycotts and combinations designed to keep merchandise from "discounters."

The Lilly "standard form" Fair Trade Contract (R. 12) incorporates an unlawful boycott. It is given color of legality only by the questionable provisions of Ohio's Fair Trade Law, Section 1333.29(B). The "contract by notice" sought to be enforced by Lilly against appellant violates

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[20] "The following acts and causing thereof are prohibited:

(k) The alteration, mutilation, destruction, obliteration, or removal of the whole or any part of the labeling of, or the doing of any other act with respect to, a food, drug, device, or cosmetic, if such act is done while such article is held for sale (whether or not the first sale) after shipment in interstate commerce and results in such article being adulterated or misbranded."

Section 1 of the Sherman Act. It is given pursuant to an Ohio statute which violates the Supremacy Clause.

VII. The 1959 Ohio Fair Trade Law accomplishes a deprivation of due process under the Fourteenth Amendment by reason of an uncontrolled and arbitrary delegation of power over the property and business lives of others without any procedural safeguards.

The theory of the Harris Bills, incorporated into the Ohio law, was that a "proprietary interest" was to be retained by the proprietor *in the fair-traded commodity.* What was proposed by these Bills to be accomplished by Act of Congress under the "commerce clause," the State of Ohio has attempted to accomplish by Act of Legislature.

The retention of the "proprietary interest" in the commodity by the "proprietor" is made mandatory by the terms of Section 1333.31 so long as the commodity is identified by the trade-mark or trade name of the proprietor."[21] The mandatory definition, moreover, encompasses every trade name or trade-mark of the "proprietor," whether he be a "sham" or "token enforcer" of resale price maintenance[22] or a vigorous enforcer; or whether the trade-mark or trade name be "strong" or "weak" or "misleading" or the subject of pending injunction or cancellation proceedings, etc.

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[21] Section 1333.31 provides:

"A proprietor shall retain a proprietary interest in any commodity with respect to which he is a proprietor after he has sold it to distributors, so long as such commodity continues to be identified by his trademark or trade name, by reason of his interest in stimulating demand for such commodity through effective distribution to ultimate consumers and of his interest in continuing protection of the good will associated with his trade-mark or trade name."

[22] Note: *The Operation of Fair Trade Programs* (1955), 69 Harv. L. Rev. 316, 331-332.

The "proprietary interest" is given life, however, only upon the arbitrary decision of the "proprietor" to "fair-trade" the commodity. The "proprietary interest" ceases upon the unilateral decision of the "fair-trader" to abandon resale price maintenance.

The proprietor's decision upon the retention of a "proprietary interest" is matched by the unilateral power given by the statute to the trade-mark owner over the business life of others. By Section 1333.29 (B) (1), (2), and (3), in his sole unfettered discretion, the "proprietor" can by notice or contract deputize and compel every person in his distribution system to assist in the enforcement of fair trade prices, both inside and outside of Ohio by controlling the identity of the persons to whom an Ohio distributor may resell. The stream of interstate and intrastate commerce at wholesale and retail levels may be effectively dammed up unless resale is effected within lines and to persons designated by the proprietor, *i.e.*:

(a) resale by the initial vendee at the fair trade price for his particular level of distribution; and

(b) resale to subsequent vendees who observe fair trade at their respective levels of distribution; and who will in turn require observance by their subsequent vendees.

In *Old Dearborn Distributing Company v. Seagram Distillers Corp.*, 299 U. S. 183 (1936), the statute before this Court permitted only resale price maintenance. This Court held that such a statute does not unlawfully delegate legislative authority, nor does it violate due process.

The conferring by the State of Ohio of an unrestrained discretion upon "proprietors" over the business life of others in the use of their property, in addition to the control of the resale price, clearly constitutes an unlawful dele-

gation of legislation to private persons without any procedural safeguards or standards whatsoever. In so doing, the State of Ohio has violated the rights of appellant under the Due Process Clause of the Fourteenth Amendment. *Washington ex rel. Seattle Trust Co. v. Roberge*, 278 U. S. 116, 121 (1928); *Carter v. Carter Coal Co.*, 298 U. S. 238, 311 (1936); Note, *Delegation of Power to Private Parties*, 37 Colum. L. Rev. 447, 458 (1937); Jaffe, *Law Making by Private Groups*, 51 Harv. L. Rev. 201, 217 (1938). *Cf. Silver v. New York Stock Exchange*, 373 U. S. 341, 364-366 (1963).

Since so many state Courts in recent years have declined to give effect to the reasoning and philosophy of the *Old Dearborn* case, *supra*, it is urged that this Court reconsider its views in that case.

SOURCES OF VARIOUS PROVISIONS OF 1959 OHIO FAIR TRADE LAW

Ohio Rev. Code §§ 1333.27-1333.34	MacLachlan Proposal	Harris Bill H. R. 10527 85th Cong. 2d Sess.	Virginia Law (June 27, 1958) (§§ 59-8.1 to 59-8.10, Code of Virginia, 1950 as Amended)	Harris Bill H. R. 1253 86th Cong., 1st Sess. H. Rep. No. 467
Recital of Purpose of Maintaining prices at all "appropriate stages" of distribution § 1333.27(B)				H. Rep. No. 467 86th Cong., 1st Sess. at 16
"Proprietor" § 1333.28(A)	§ 2	§ 5		§ 5(A)
"Proprietary Interest" § 1333.31	§ 2	§ 5		§ 5(B)
"Contract" § 1333.28(I)			Defined to Include Notice § 59-8.2(10)	
Consideration § 1333.28(I)				
Acquisition of Commodity with Notice	§ 2	§ 5		§ 7
"Notice" § 1333.28(J)	§ 2	§ 5		§ 5(C)
Methods of Conveying Notice, e.g., by mail, notice on merchandise, containers, actual notice; notice that price is subject to change (§ 1333.30)	§ 2	§ 5		
Establishment of Resale Prices by contract or by notice (§ 1333.29)	§ 3 (Notice only)	§ 5 (Notice only)		§ 6 (Notice only)
Differentiation of Prices at levels of distribution § 1333.29(A)	§ 3	§ 5		§ 6
Establishment of Wholesale and Retail Prices although Proprietor Competes with Wholesaler § 1333.29(A)	§ 3	§ 5		§ 6
Buyer will not resell at less than minimum price for his level of distribution § 1333.29(B)	§ 3	§ 5		
Buyer will require distributor to get resale price agreement of every other distributor, plus agreement to get an agreement § 1333.29(B)				
Seller will require from any other Retail-			[illegible]	

"Contract" § 1333.28(I)			Defined to include Notice § 59-8.2(10)	
Consideration § 1333.28(I)				
Acquisition of Commodity with Notice	§ 2	§ 5		§ 7
"Notice" § 1333.28(J)	§ 2	§ 5		§ 5(C)
Methods of Conveying Notice, e.g., by mail, notice on merchandise, containers, actual notice; notice that price is subject to change (§ 1333.30)	§ 2	§ 5		
Establishment of Resale Prices by contract or by notice (§ 1333.29)	§ 3 (Notice only)	§ 5 (Notice only)		§ 6 (Notice only)
Differentiation of Prices at levels of distribution § 1333.29(A)	§ 3	§ 5		§ 6
Establishment of Wholesale and Retail Prices although Proprietor Competes with Wholesaler § 1333.29(A)	§ 3	§ 5		§ 6
Buyer will not resell at less than minimum price for his level of distribution § 1333.29(B)	§ 3	§ 5		
Buyer will require distributor to get resale price agreement of every other distributor, plus agreement to get an agreement § 1333.29(B)				
Seller will require from any other distributor (a) no resale at less than price stipulated for distributor's level of distribution, (b) distributor will require same agreement from another distributor to whom he may resell § 1333.29(B)			§59-8.3 (c)(1)	
Third Party Beneficiary Provision in favor of Proprietor and any distributors bound by similar contract or notice § 1333.29(C)				
Permissible Removal of Trade Mark § 1333.33(D)				
Horizontal Price fixing prohibited except as permitted in § 1333.29			§ 59-8.10	
Cooperation by Distributors with Proprietor expressly or impliedly authorized 1333.29(B)	§7 (Express Provision)			§ 10 (By implication)

ARGUMENT.

I. By reason of the historic illegality of price fixing, the history of "fair trade" legislation is one of reluctance to create or extend the exemption from the antitrust laws for private price fixing in commerce.

1. The history of resale price maintenance legislation has been characterized by stormy and turbulent advocacy and opposition. "Few subjects of direct concern to business—both small and large—engender more acrid controversy than that of fair trade." Report of Senate Select Committee on Small Business on Fair Trade, Sen. Rep. No. 2819, Eighty-fourth Cong., 2d Sess. (1956) 1.

Although demands for Federal legislation covering articles sold in interstate commerce took form in 1912 shortly after this Court rendered its decision in the *Miles Medical* case, 220 U. S. 373 (1911), it was twenty-five years before an enabling act was passed by the Congress—and then only after the Miller-Tydings Bill was attached as a rider to a District of Columbia Appropriation Bill.[23]

When the McGuire Act was before the Congress, it was reported out of the Senate Committee on Interstate

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[23] S. Rep. 879, 75th Cong., 1st Sess., Report to accompany H. R. 7472, July 6, 1937, Providing Additional Revenue for the District of Columbia, p. 5; 81 Cong. Rec. 7486-7487. The bitterness of the division over the legislation clearly appears in the historic Senate debate. 81 Cong. Rec. 7488-7497. The extended history of the first twenty-five years of legislative effort is recounted in *Schwegmann Bros. vs. Calvert Distillers Corp.*, 341 U. S. 384 (1951); Federal Trade Commission, Report on Resale Price Maintenance (1945) 36-66. Neither the eloquence nor appearances of Mr. Louis Dembitz Brandeis could move the Congress to enact resale price maintenance legislation, let alone still controversy in the Committee. Hearings before the House Committee on Interstate and Foreign Commerce on H. R. 13305 (Stevens Bill), 63d Cong., 2d and 3d Sess. (1915), reproduced in *Hearings Before the House Committee on Interstate and Foreign Commerce on H. R. 11* (Capper-Kelly) Sixty-ninth Cong., First Sess. at 80 *et seq*., esp. 116-117.

and Foreign Commerce without recommendation. Sen. Rep. No. 1741, Eighty-second Cong., First Sess. (1952). The debate upon the McGuire Act was long and hard, both in the House and the Senate.[24] In the House of Representatives, the debate was characterized by a three way conflict: among opponents and proponents of any legislation; and by a jurisdictional conflict between the House Judiciary Committee and the House Committee on Interstate and Foreign Commerce. The conflict between the Committees of the House revolved about the best method of amending the Miller-Tydings Act.[25] The upshot of the long, searching

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[24] 98 Cong. Rec., Part 4, 82d Cong., 2d Sess., pp. 4896-4926; 4933-4956 (House of Representatives); 98 Cong. Rec., Part 7, 82d Cong., 2d Sess., pp. 8716-8748; 8819-8858; 8865-8873; 8881-8892. (Senate.) The debate was preceded by an extensive Report on "Fair Trade: The Problem and the Issues" by the Select Committee on Small Business, H. Rep. No. 1292, 82d Cong., 2d Sess. (1952), in which the Committee stated its belief (p. 1) that "the states should retain jurisdiction over retail trade practices and that Congress should make it possible to enforce fair trade contracts in interstate commerce." In H. Rep. No. 1437 on H. R. 5767, 82d Cong., 2d Sess., the Committee on Interstate and Foreign Commerce recommended passage of the measure.

[25] 98 Cong. Rec., Part 4, 82nd Cong., 2d Sess., *esp.* 4934-4956. The conflict in debate in 1952, and the careful scrutiny of the McGuire Act are reflected in the 1959 Fair Trade Hearings before the Committee on Interstate and Foreign Commerce of the House of Representatives. 86 Cong., 1st Sess., H. R. 1253 (Harris Bill). Mr. John W. Anderson, President, American Fair Trade Association and President, Quality Brands Association of America, Inc., stated 652 to 653:

> "We had some doubts about the Miller-Tydings Act, for reasons that should not be discussed here, and those doubts were proved well founded when the courts later virtually disabled the Miller-Tydings Act.
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> "Then a new act became necessary, and the McGuire bill was presented by the druggists; The American Fair Trade Council being not satisfied with the structure of the McGuire bill, presented the Keogh bill, which was referred to the committee that deals with trademarks, the Judiciary, Congressman Celler's Committee.

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debate was a close, careful scrutiny of the McGuire Act both in principle, and word for word.

There would not appear to be room for argument that Congress intended a "liberal" construction to be given

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"This Commerce Committee before which I speak, showed no preference for the Keogh legislative text and (sic) adopted it verbatim except that section 4, a new section 4, was substituted for section D of the Keogh text. Our section D was intended to prevent the invasion of a fair-trade State from across its borders by cut prices. We were told and assured—and there is overwhelming documentation, I might say, of the fact that everybody was assured by sponsors of the original draft of the McGuire bill, that the new section 4 would hold against that interstate discounting. We of AFTC could not believe it would.

"There was prepared in a conference in which the druggists and the beverage industries and the diversified fair-trading industries were represented, what came to be known as the hometown amendment, and all present agreed to support that amendment to cure the doubt. At least, that existed as to whether section 4 would hold. That support was not given and the amendment was defeated.

"Section 4, when it finally came to a Federal court test, was destroyed. And thereupon the floodgates were open. Fair-trade States were invaded by discounters of all kinds, mail order and what-not, and we believe that that cruel invasion of fair-trade States that had non-signer clauses which bound nonsigners to the fair-trade prices on these popular products—the fact that they were bound there to fair-trade prices while they were destroyed or seriously injured by the invasion of price cutters—we feel that that fact influenced State courts to find some reason for destroying the nonsigner clause.

"And as you men know, in many States that nonsigner clause was destroyed in the manner and for the reasons the American Fair Trade Council predicted it would be.

"I am not going to burden this record with documentation supporting those statements, but if it is desired at any time, I shall be happy to supply it.

"Now, as I say, the Keogh bill was to be moved over verbatim under the McGuire head. And I thought that was a fine idea until I saw how the bill had been altered. And so, as a result, the McGuire Act failed our economy, failed the reseller, failed the manufacturer, and failed the public. It became necessary then for the third time to have a new act. Now, with two strikes on us, we again face this honorable committee."

either the Miller-Tydings Act or the McGuire Act.[28] The purpose of the McGuire Act was merely to "shore up" the non-signer contract provisions in the state fair trade legislation enacted pursuant to Miller-Tydings. The strict construction generally given exemptions from the antitrust laws and, more specifically the exemption for resale price maintenance, accords with the history of such legislation.

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[28] While the debate in the House contains references to the desirability of free operation of state policy in resale price maintenance, 98 Cong. Rec. 4901 (1952) (remarks of the Sponsor, Rep. McGuire) the purpose and intent of the McGuire Act was limited. As stated by Rep. Priest, Chairman of the House Interstate and Foreign Commerce Subcommittee which considered and reported on the McGuire Bill:

> "We concluded in the Committee on Interstate and Foreign Commerce that the best approach was to pass legislation *permitting, mind you, permitting the State fair-trade laws that have been enacted* and adopted by the States to be operative and to be effective without constituting a burden on interstate commerce." 98 Cong. Rec. 4936. (Italics added.)

The Sponsor of the measure, Mr. McGuire, stated:

> "The McGuire bill adds no new powers to the Federal Trade Commission Act. It merely exempts from the Federal Trade Commission Act and the Antitrust Acts so far as interstate commerce is concerned *that type of resale price maintenance contract which is permitted by the fair-trade acts of 45 States.*" 98 Cong. Rec. 4900-4901. (Italics added.)

Rep. Harris, the next senior majority member of Mr. Priest's Subcommittee stated:

> "The Supreme Court of the United States, however, held—*and that is what we are here to correct today—that the Miller-Tydings Act applied only to those who were parties to the contract.* The majority of the court held that in non-signer cases, the Miller-Tydings Act did not apply.
>
> About the same time, another problem arose with reference to articles which cross State lines in the course of a retail sale. That case came from Pennsylvania—the Wentling case. The court of appeals said that the fair-trade law of the State of Pennsylvania could not apply to articles which were sent across Pennsylvania State boundaries into other States.

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Although many resale price maintenance bills have been introduced into the Congress since the enactment of the McGuire Amendment to the Federal Trade Commerce Act, none has passed, and all have encountered powerful opposition.[27] The Department of Justice and the Federal Trade Commission have opposed resale price maintenance legislation; and they have been joined in such opposition by the American Bar Association, among others.

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As a consequence of these decisions we bring the McGuire Bill to you today." 98 Cong. Rec. 4913. (Italics added.)

Rep. Dolliver, the ranking minority member of the Subcommittee, stated:

"*The whole purpose of these bills that are now before us, or at least the main purpose, is to correct those decisions that were made by the courts*, so that the States in question if they decide so to do may sustain and have in their respective jurisdictions vertical retail price fixing." 98 Cong. Rec. 4900. (Italics added.)

In the Senate, Senator Humphrey, the spokesman for the measure, stated:

"The pending bill changes no Federal policy. *It changes no State law. It adds nothing whatsoever new to the fair-trade policy.* It has only one purpose, namely, to clarify a law which the Supreme Court found, by a split decision, not to cover certain practices.

Therefore, Mr. President, the purpose of the pending bill is only to plug the loopholes in the Federal Miller-Tydings Act, which is a measure to enable the States to carry out fair-trade practices." 98 Cong. Rec. 8819. (Italics added.)

The purpose of the McGuire Act to overturn the Schwegmann and Wentling decisions and the limited scope of the statute are generally understood. The National Wholesale Druggists' Association, *The Basis and Development of Fair Trade* (3rd Ed., 1955) at 12, 91.

[27] Hearings on such legislation have been held in recent years as follows: *Hearings Before a Subcommittee of the Committee on Interstate and Foreign Commerce, House of Representatives, Eighty-fifth Congress*, Second Session on H. R. 10527, H. R. 10770, H. R. 10847, H. R. 11048, H. R. 11216, and H. R. 11264, April 29, 30, May 1, 6, and 7, 1958; *Hearings Before the*

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The highest courts of twenty-four states, have, in one manner or another, declared their nonsigner fair trade provisions unconstitutional. Four states and the District of Columbia have never enacted fair trade laws. Both by state court and federal decision, the enforcement of exist-

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Committee on Interstate and Foreign Commerce, House of Representatives, Eighty-sixth Congress, First Session on H. R. 768, H. R. 1253, H. R. 2463, H. R. 2729, H. R. 3187, H. R. 5252, and H. R. 5602, March 16, 17, 18, 19, 20, 23, 24, and 25, 1959; *Hearings Before a Special Subcommittee on Fair Trade of the Committee on Interstate and Foreign Commerce, United States Senate, Eighty-sixth Congress,* First Session on S. 1083, June 15, 16, and July 10, 1959; *Hearings Before a Subcommittee of the Committee on Interstate and Foreign Commerce, House of Representatives, Eighty-seventh Congress,* Second Session on H. J. Res. 636, H. J. Res. 637, H. J. Res. 639, H. J. Res. 679, H. R. 10335, H. R. 10340, H. R. 10517, H. R. 11227, H. R. 11346 and H. R. 11778, June 11, 12, 13, 14, 15, 1962; *Hearings on S. J. Res. 159 before a Subcommittee of the Senate Committee on Commerce, Eighty-seventh Cong.,* Second Sess. (1962); *Hearings before a Subcommittee of the Committee on Interstate and Foreign Commerce, House of Representatives, Eighty-eighth Congress,* First Session on H. R. 3669, April 23, 24, 25, 26; May 14 and 15, 1963.

In addition, hearings were held before a Subcommittee of the Select Committee on Small Business, United States Senate, Eighty-fifth Congress, Second Session on *Competitive Impact of Discount House Operations on Small Business,* June 23, 24, and 25, 1958.

Both the Harris Bill and the Quality Stabilization Bill have been reported favorably by the Committee on Interstate and Foreign Commerce of the House of Representatives, H. Rep. No. 467, Eighty-sixth Cong., First Session, on H. R. 1253, June 9, 1959 ("Harris Bill"); H. Rep. No. 2352 on H. J. Res. 636, 87th Cong., 2nd Sess. (1962) ("Quality Stabilization"); H. Rep. No. 566, Eighty-eighth Congress, First Session, on H. R. 3669, July 22, 1963 ("Quality Stabilization Bill").

Hearings on the pending "Quality Stabilization" legislation, S. 774, before the Special Subcommittee on Quality Stabilization of the Committee on Commerce of the United States Senate have been in progress during the current session. In the present Congress, a host of bills have been introduced into the House relating to "Quality Stabilization" and fair trade. Weston, *Fair Trade Alias "Quality Stabilization": Status, Problems and Prospects* (1963) 22 ABA Antitrust Section: Vertical Arrangements 76, 96, nn. 92, 93.

ing fair trade legislation has been made difficult. H. Rep. No. 566, Eighty-eighth Cong., First Sess. (1963) at 5; Alexander, *Quality Stabilization and the Crisis in Fair Trade* (1963) 51 Georgetown L. J. 783-795.

2. Lilly drugs and pharmaceuticals sold by retail pharmacies over the counter and by prescription are "in the stream" of interstate commerce. *Cf. Northern California Pharmaceutical Assn. v. United States*, 306 F. 2d 379 (C. A. 9, 1962), *cert. den.*, 371 U. S. 862 (1962); *United States v. Utah Pharmaceutical Assn.*, 201 F. Supp. 29 (D. Utah, 1962). Over 90% of the prescriptions sold are dispensed by the pharmacists as precompounded by the manufacturer, without any significant change in form. 306 F. 2d at 386; 201 F. Supp. at 33.

3. In *White Motor Company v. United States*, 372 U. S. 253, 260 (1963), this Court reiterated the historic premise that:

> "Price-fixing arrangements, both vertical (*United States v. Parke, Davis & Co.*, 362 U. S. 29, 80 S. Ct. 503, 4 L. Ed. 2d 505; *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U. S. 373, 31 S. Ct. 376, 55 L. Ed. 502) and horizontal (*United States v. Socony Vacuum Oil Co.*, 310 U. S. 150, 60 S. Ct. 811, 84 L. Ed. 1129; *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons*, 340 U. S. 211, 71 S. Ct. 259, 95 L. Ed. 219), are per se violations of the antitrust laws * * *."

In *White Motor*, this Court also reiterated (372 U. S. at 260) that:

> "In any price-fixing case, restrictive practices ancillary to the price-fixing scheme are also quite properly restrained. Such was *United States v. Bausch & Lomb Optical Co.*, 321 U. S. 707, 64 S. Ct. 805, 88 L. Ed. 1024, where price fixing was 'an integral part of the whole distribution system,' including customer restrictions."

4. Exemptions from the antitrust laws for price fixing "contracts or agreements" in interstate commerce pursuant to enabling legislation authorized by the Miller-Tydings and the McGuire Acts are in derogation of the fundamental national policy expressed in the antitrust laws and have been strictly construed. In *United States v. McKesson and Robbins, Inc.*, 351 U. S. 305, 316 (1956), this Court held that:

> "* * * Congress has marked the limitations beyond which price fixing cannot go. We are not only bound by those limitations but we are bound to construe them strictly, since resale price maintenance is a privilege restrictive of a free economy."

Accord: *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U. S. 384, 388 (1951); *General Electric Co. v. Masters Mail Order Co. of Washington, D. C., Inc.* 244 F. 2d 681, 683 (C. A. 2d, 1957), *cert. den.* 355 U. S. 824 (1957).

5. This Court has consistently held that exemptions, which are specific exceptions to the general command of the antitrust laws, should be narrowly construed and applied only where any conditions for exemption are clearly satisfied. Pogue, *The Rationale of Exemptions from Antitrust*, 19 ABA Antitrust Section: Regulated and Exempt Industries (1961) 313, 327. This Court has continued to hold that repeals of the antitrust laws by implication from a regulatory statute are strongly disfavored, and have only been found in cases of "plain repugnancy between the antitrust laws and the regulatory provisions." *United States v. Philadelphia National Bank*, 374 U. S. 321, 350-351 (1963).

6. Where the fair trade transaction involves interstate commerce, the fair trade contract must comply with the federal fair trade enabling legislation as well as the state or local fair trade acts in order for the transaction to

be exempted from the Federal antitrust laws. "The fact that a state authorizes the price fixing does not, of course, give immunity to the scheme, absent approval by Congress." *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U. S. 384, at 386 (1951). "* * * When a state compels retailers to follow a parallel price policy, it demands private conduct which the Sherman Act forbids. Parker v. Brown, 317 U. S. 341, 350 (1943)." *Ibid*, at 389.

Differences between the federal enabling legislation and state or local acts, reflected in a fair trade contract drawn pursuant to the nonconforming local act, will remove the federal exemption for the fair trade contract. "A distributor of a trade-marked article may not lawfully limit by agreement, express or implied, the price at which or the persons to whom its purchaser may resell, except as the seller moves along the route which is marked by the Miller-Tydings Act." *United States vs. Bausch and Lomb Co.*, 321 U. S. 707, 721 (1944).

7. Moreover, state legislation enacted pursuant to permissive enabling federal legislation must be *of the kind* contemplated by the Congress before exemption from federal regulation may be accomplished. *F. T. C. vs. Travelers Health Assn.*, 362 U. S. 293 (1960); *Grand Jury Investigation of Aviation Insurance Industry*, 183 F. Supp. 374 (S. D. N. Y., 1960).

II. Lilly's notice and "warning letter" to Hudson constituted a demand that Hudson adhere to an unlawful boycott and price fixing combination.

Lilly has signed 1,420 fair trade contracts with retailers in the State of Ohio (R. 34). Each of the contracts contains a boycotting requirement. Paragraph 6 of Lilly's "Manufacturer-Retailer Contract" provides:

"6. Retailer agrees not to knowingly sell any of Manufacturer's 'Identified Commodities' to any dealer who fails to observe the minimum retail resale prices established under Paragraph 3 hereof." (R. 13).

Plainly upon the face of these 1,420 contracts an illegal boycotting combination has been organized among retailers in the State of Ohio. Notice of these contracts has been given Hudson, and by warning letter of January 26, 1960 (R. 17-18), demand has been made that Hudson's future operations "be in accordance with your obligations under the contracts and under the Ohio Fair Trade Act * * *"

This Court has made clear that neither an enabling statute nor a fair trade "contract or agreement" may go beyond the limits set by the federal enabling legislation. *Schwegmann v. Calvert Distillers Corp.*, 341 U. S. 384 (1951).

The Miller-Tydings Act and the McGuire Act permit the making of only simple, "vertical" contracts or agreements. Section 5(a)(2)[28] of the McGuire Act permits: (a) "contracts or agreements prescribing minimum or stipulated prices"; (b) "or requiring a vendee to enter into contracts or agreements prescribing minimum or

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[28] Section 5(a)(2) of the McGuire Act provides:

"Nothing contained in this Act or in any of the Antitrust Acts shall render unlawful any *contracts or agreements* prescribing minimum or stipulated prices, or requiring a vendee to enter into *contracts or agreements* prescribing minimum or stipulated prices, for the resale of a commodity which bears, or the label or container of which bears, the trade-mark, brand, or name of the producer or distributor of such commodity and which is free and open competition with commodities of the same general class produced or distributed by others, when *contracts or agreements of that description* are lawful as applied to intrastate transactions under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale."

stipulated prices"; (c) "when contracts or agreements *of that description* are lawful as applied to intrastate transactions * * *"

The Ohio Fair Trade Act obviously goes beyond the limited type of agreement authorized by the McGuire Act. By Section 1333.29(B)[29] the "contract or notice" may include a great many horizontal price fixing arrangements and marketing limitations. In keeping with the scope and purpose of these sections, Lilly has included Paragraph 6, *supra*, in its "Manufacturer-Retailer Contract."

Both "retailers" and "wholesalers" are distributors within the meaning of Section 1333.28(E).[30] The provisions of both the Lilly Fair Trade Contract and of Sections 1333.29(B) (2) and (3) contemplate and authorize a

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[29] "(B) Any such contract or notice may contain the following provisions:

(1) That the buyer will not resell such commodity at less than the minimum resale price stipulated by the proprietor thereof for the level of distribution at which the buyer resells the same;

(2) That the buyer will require from any distributor to whom he may resell such commodity an agreement that such distributor will not, in turn, resell such commodity at less than the minimum resale price stipulated by the proprietor thereof for the level of distribution at which such distributor resells and that such distributor, if he resells to another distributor, will make the same agreement with the distributor to whom he may resell;

(3) That the seller will require from any other distributor to whom he may sell other items of such commodity an agreement that such distributor will not, in turn, resell such commodity at less than the minimum resale price stipulated by the proprietor for the level of distribution at which such distributor resells and that such distributor, if he resells to another distributor, will make the same agreement with the distributor to whom he may resell."

[30] "Sec. 1333.28. As used in sections 1333.27 to 1333.34, inclusive, of the Revised Code:

(E) 'Distributor' means any person who acquires a commodity for the purpose of resale."

series and system of *horizontal agreements* among wholesalers and retailers in violation of Section 5(a)(5) of the McGuire Act.

Such contract and statutory provisions arise out of the desire of "fair traders" to prevent the "diverting" of fair-traded merchandise. The problem of keping merchandise from the discounter has been emphasized by the "fair-traders." [31]

Such contract and statutory provisions also arise out of the desire of the "fair trader" to control resale mechanisms. In arguing for the enactment of H. R. 10527, the first proposed national fair trade law introduced by Representative Oren Harris, Forrest Teel, Executive Vice President of Eli Lilly and Company stated:

> "Just as the manufacturer selling to the ultimate consumer on a consignment basis or through a company-owned store has a property right in the commodity sold, so the manufacturer that permits the retailer to sell a product under the goodwill of its trademark has a property right in the commodity sold. A trademark is a valuable property right which deserves protection. H. R. 10527 would thus equalize rights in the distribution of trademarked commodities, no matter what method of distribution is used and would, in

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[31] E.g., Statement of Herman T. VanMell, Vice President and General Counsel, Sunbeam Corp., Hearings Before a Subcommittee of the Select Committee on Small Business, United States Senate, Eighty-fifth Cong., Second Sess., on *Competitive Impact of Discount House Operations on Small Business*, (1958) at 419-420; Testimony of Stanley A. Weigel, Counsel, California Pharmaceutical Association, Hearings Before a Subcommittee of the Committee on Interstate and Foreign Commerce on H. R. 10527, etc. (1958) (Harris Bill) at 74 to 75; Statement of Thomas A. Rothwell, Counsel, O. M. Scott & Sons, Marysville, Ohio, Hearings before a Subcommittee of the Committee on Interstate and Foreign Commerce on H. J. Res. 636, etc. (1962) ("Quality and Price Stabilization") p. 308.

fact, encourage distribution through independent wholesale and retail merchants."

Hearings, Eighty-fifth Cong., Second Sess. on H. R. 10527 etc. (1958) at 125 (Italics added).

The illegality of the inclusion in the fair trade contract or agreement of a boycott is clear. Harper, *Essentials and Embellishments of The Fair Trade Contract*, The Basis and Development of Fair Trade (The National Wholesale Druggists' Association, 3rd Ed., 1955) states at 96-97:

> "The fact, however, that the legislatures have chosen the fair trade contract as the vehicle for permitting the manufacturer to protect his good will by regulating minimum resale prices seems to be regarded by some manufacturers and their draftsmen as the opportunity to bring in all sorts of provisions which they may regard as salutary, but which endanger the enforcement of the contract.
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> * * *
>
> One favorite provision is an agreement by the wholesaler that he will not sell the manufacturer's product to a retailer who has failed to observe the minimum resale price which the manufacturer has established by his manufacturer-retailer contract * * * This provision is clearly illegal. The Supreme Court made it perfectly clear in *Fashion Guild v. Federal Trade Commission* that an agreement to boycott is in violation of the anti-trust laws, no matter how high a motive the boycotters may have, and no matter how desirable an economic result they may seek to accomplish. *There is nothing in the fair trade laws or the McGuire Act which authorizes a boycott. Why imperil the enforcement of the contract by the insertion of such a provision?*" (Italics added.)

The foregoing reasoning applies fully to the "retailer" provisions of Section 6 of the Lilly Contract.

This Court and the lower federal Courts have also made plain that fair trade contracts like Lilly's are in violation of the antitrust laws. The Circuit Court of Appeals for the Second Circuit, in *Connecticut Importing Co. v. Continental Dist. Corporation*, 129 F. 2d 651 (1942), gave effect to the "horizontal price fixing" provisions of the Miller-Tydings Act, now also reflected in Section 5(a)(5) of the McGuire Act. The proofs there showed that Continental Distilling and its distributors agreed to maintain uniform prices in disposing of Continental's liquors; that all the distributors were members of a price maintenance trade association; and that a distributor who failed to maintain prices was black listed by Continental and its Connecticut distributors. In rejecting the defense of "fair trade," the Court stated (129 F. 2d at 654):

> "* * * the violation of law would not be in the agreement of Continental to fix resale prices, but in the combination of the distributors with one another and with Continental to effect this result."

In so holding, the Opinion foreshadowed the rulings by this Court in *United States v. Bausch & Lomb Co.*, 321 U. S. 707, 64 Sup. Ct. 805 (1944); and *United States v. Frankfort Distilleries, Inc.*, 324 U. S. 293, 65 Sup. Ct. 661 (1945).

When in the case at bar, Lilly gave Hudson notice of the signing of its fair trade agreements, and in accordance with Section 1333.29(B) demanded of Hudson that the latter abide by such contracts, Lilly was attempting to require Hudson to abide by a price fixing contract in violation of Section 1 of the Sherman Act, and was inviting Hudson to join an illegal and unenforceable boycott and combination.

III. The Ohio law exceeds any permissible limits of Federal Enabling Legislation. Its provisions are derived from proposed Congressional "proprietary interest" national fair trade legislation, formulated and intended to supersede the Miller-Tydings and McGuire Act systems of state enabling legislation for resale price maintenance "contracts or agreements."

A. The McGuire Act was enacted to give validity to non-signer provisions of state fair trade legislation.

Schwegmann Bros. vs. Calvert Distillers Corp., 341 U. S. 384 (1951), held that the Miller-Tydings amendment did not make binding upon nonsigners resale prices fixed in contracts under state fair trade laws.

In the course of its Opinion, this Court noted that "had Congress desired to eliminate the consensual element from resale price fixing by a single contract binding by 'coercion' upon nonsigners, *either* a nonsigner provision would have been included *or* resale price fixing would have been authorized without more." 341 U. S. at 390.

In amending the federal enabling legislation to undo the result in *Schwegmann* by the McGuire Act, Congress did not authorize "resale price fixing * * * without more." In the "normal and customary meaning" of words (341 U. S. at 388), Congress authorized only state enabling legislation for price fixing "contracts or agreements." [32]

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[32] The McGuire Act also provided that neither "the making of contracts or agreements" pursuant to state fair trade laws nor the enforcement thereof shall constitute an unlawful burden on interstate commerce. Section 5(a) (4). The purpose of this provision was to remove any obstacle in the way of an application of state fair trade laws to retail transactions or advertising originating in a fair trade state but crossing state lines. Such an obstacle had been suggested in *Sunbeam Corporation v. Wentling*, 185 F. 2d 903 (CA 3d, 1950), *cert. granted, judgment vacated and remanded* (341 U. S. 944 (1951)) *for consideration in the light of the Schwegmann case.*

B. By the end of 1957, the "contract or agreement" approach of Miller-Tydings and McGuire had broken down.

By the end of 1957, it was the opinion of proponents of fair trade that resale price maintentance by means of a federally enabled system of state authorized "contracts or agreements" had failed. In the numerous hearings since 1958, the Congress was made acquainted with, and its Committee Reports from 1959 to date acknowledge the breakdown of resale price maintenance by "contract or agreement." [33] The reasons given by the proponents of the new legislation for the failure of Miller-Tydings and McGuire were at least four-fold: [34]

(a) In many states, the nonsigner clause of state "fair trade" laws had been declared unconstitutional; other states had declared their entire fair trade laws invalid; four states and the District of Columbia had no such laws. H. Rep. No. 467, Eighty-sixth Congress, First Session to accompany H. R. 1253 (Harris Bill) June 19, 1959, 6.

(b) This Court in *United States v. McKesson and Robbins, Inc.*, 351 U. S. 305 (1956) held invalid, pursuant to Section 5(a) (5) of the McGuire Act, price fixing "contracts or agreements" of a drug manufacturer and wholesalers of the manufacturer's products where the manufacturer was also a competing wholesaler. The ruling in the *McKesson* case was regarded as a further blow to fair

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[33] *Supra*, note 24; H. Rep. No. 467, 86th Cong., 1st Sess. (1959) 4-7; H. Rep. No. 2352, 87th Cong., 2d Sess. (1962) 6-9; H. Rep. No. 566, 88th Cong., 1st Sess. (1963) 3-6.

[34] E.g., Statement of Herman T. VanMell, Vice President and General Counsel, Sunbeam Corporation, *Hearings on Competitive Impact of Discount House Operations on Small Business*, 85th Congress, 2nd Session (1958), 417-421; Testimony of Herman S. Waller, Counsel, National Association of Retail Druggists, *Hearings on H. R. 10527 ("Harris Bill"), etc.*, 85th Congress, 2nd Session, pages 540 to 563.

trade, since it inhibited the "orderly marketing of goods" at the wholesale level. *E.g.*, Testimony of Herman S. Waller, Counsel, National Association of Retail Druggists, Hearings, *supra* note 27, 548.

(c) *General Electric Co. vs. Masters Mail Order Co. of Washington, D. C., Inc.*, 244 F. 2d 681 (CA 2d, 1957), *cert. den.*, 355 U. S. 824 (1957), held lawful the establishment by a retailer doing business in a fair trade state of an office in a nonfair trade jurisdiction, and the sale of merchandise below the fair trade price by means of the parties to the sale agreeing to the passage of title in the nonfair trade jurisdiction. H. Rep. No. 467, 86th Congress, First Session to accompany H. R. 1253 (Harris Bill), June 19, 1959, 7.

(d) Additional reasons given at various Hearings for the crippling of fair trade arose out of the enforcement by the Department of Justice of the settled rule of antitrust law that a boycott, or cooperative or combined efforts may not lawfully be utilized to institute, maintain or extend pricing systems in commerce. *United States vs. Frankfort Distilleries, Inc.*, 324 U. S. 293 (1945); *United States vs. Parke, Davis & Co.*, 362 U. S. 29 (1960).[35]

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[35] Consent decrees have recently been entered against a number of pharmaceutical associations prohibiting price activity by horizontal arrangement. *U. S. v. Nassau-Suffolk Pharmaceutical Society, Inc.*, 1963 Tr. Cas., Par. 70,937 (E. D. New York, 1963) ("drug products or related goods"); *U. S. v. Ibid.*, Par. 70,396 (E. D. New York, 1963), ("prescription drugs or professional services"); *U. S. v. Hawaii Retail Druggists Assn.*, 1963 Tr. Cas., Par. 70,914 (D. Hawaii, 1963), ("any drug product or related goods"); *U. S. v. Arizona Pharmaceutical Assn. et al.*, 1963 Tr. Cas., Par. 70,614 (D. Arizona, 1963), ("prescription drugs"); *U. S. v. Idaho State Pharmaceutical Assn., Inc.*, 1963 Tr. Cas., Par. 70,689 (D. Idaho, 1963), ("prescription drugs"); *U. S. v. Northern California Pharmaceutical Assn.*, 1963 Tr. Cas., Par. 70,690. (N. D. California, 1963) ("prescription drugs").

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C. The proposals to cure the breakdown of the Congressional enabling legislation sought to give relief from the "contract or agreement" approach to fair trade.

The hearings in the Ohio Legislature on the 1959 Fair Trade Act were held before the House Judiciary Committee on April 15, April 23, April 29, and May 28, 1959, and before the Senate Judiciary Committee on June 4, and June 9, 1959 (U. R. 161-366). Between January 11, 1958, the date of the declaration of unconstitutionality of the 1936 Ohio Fair Trade Law, and the conclusion of the hearings before the Senate Judiciary Committee of the Ohio Legislature on June 9, 1959, the draftsmen of the new Ohio Fair Trade Legislation had available to them at least the following materials:

1. MacLachlan, *A New Approach to Resale Price Maintenance* (1957) 11 Vanderbilt L. Rev. 145.

2. *H. Rep. Hearings on H. R. 10527*, Eighty-fifth Cong., Second Sess. (introduced by Representative Harris), etc., April 29, 30, May 1, 6, and 7, 1958.

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The decree in the *Nassau-Suffolk Pharmaceutical* case, 1963 Tr. Cas., Par. 70,937, 78,735 provides:

"Defendant Nassau-Suffolk Pharmaceutical Society, Inc., is hereby enjoined and restrained from directly or indirectly:

* * *

(E) Advocating, suggesting, urging, inducing, compelling, coercing or in any other manner influencing or attempting to influence any manufacturer *to enforce fair trade prices* for the products of such manufacturer;

(F) *Notifying or otherwise advising any manufacturer of sales of its products at less than fair trade prices or threatening, warning or advising any druggist that it will do so;*

(G) *Instigating or instituting lawsuits to maintain fair trade prices*, recommending or suggesting attorneys or paying legal fees or expenses or collecting evidence therefor, or threatening or warning any druggist that it will do so." (Italics added.)

3. *Hearings on Competitive Impact of Discount House Operations on Small Business,* Eighty-fifth Cong., Second Sess., June 23, 24 and 25, 1958.

4. Enactment of Virginia Fair Trade Law, Virginia Acts of Assembly, 1958, Chapter 259, Approved March 8, 1958, effective June 27, 1958. (Code of Virginia, as amended, Sections 59-8.1 to 59-8.10.)

5. *H. Rep. Hearings on H. R. 1253* (introduced by Representative Harris), etc., Eighty-sixth Cong., First Sess., March 16, 17, 18, 19, 20, 23, 24, and 25, 1959.

6. *Senate Hearings on S. 1083* (Humphrey-Proxmire Bill, same as H. R. 1253), Eighty-sixth Cong., First Sess., June 15, and 16, July 10, 1959.

The conception of the retention of a "proprietary interest" in merchandise identified by the trade-mark of a "proprietor" was originated by Professor James A. MacLachlan in *A New Approach To Resale Price Maintenance* (1957), 11 Vanderbilt L. Rev. 145. The bill suggested by Professor MacLachlan was devised at the request of proponents of resale price maintenance who "requested advice on * * * whether their case merited a fresh legal approach: Professor MacLachlan's objectives (11 Vanderbilt L. Rev. 146-147) were to formulate a *national* fair trade law, not merely an enabling act, and thereby:

a. Withdraw the word "fair" from the resale price maintenance controversy;

b. "More fundamentally," clarify issues "by renouncing the device of the nonsigner clause. *Where antagonism is not aroused by the use of the Fair Trade label, it can flow from a sense of outrage at holding a man to a contract he never made.*"

In "such a matter of national concern, Congress should take the lead in determining national policy." (11 *Vanderbilt L. Rev.* at 147).

Before the Congress, Professor MacLachlan took responsibility for drawing up the first Harris Bill. (Hearings on H. R. 10527, etc. (1958), Eighty-fifth Cong., Second Sess. 267.) He also stated that "*this bill does not proceed upon a contract theory, so nobody is going to be held for a contract he did not sign.*" *Ibid.*, at 263.

In order to overcome the failure of the "contract or agreement" system, binding upon nonsigners, the bill had the fundamental objective of permitting the proprietor to organize the market "at the various stages of distribution," and in co-operation with his distributors. (11 *Vanderbilt L. Rev.* at 151).

D. The Ohio law derives from proposed national fair trade legislation.

The proposed 1958 and 1959 Congressional legislation and the Ohio Fair Trade Law of 1959 were drafted in order to "by-pass" the entire "contract or agreement" method of establishing and maintaining resale prices. The Ohio Legislative proceedings which produced the 1959 Act (U. R. 193-366) ignored the hard-fought and "acrid" history of the Federal legislation. The Ohio Legislature therefore readily approved a departure in fair trade law which made every "distributor" with "notice" a "contractor."

1. The minority of the Supreme Court of Ohio has held that the "heart of the new Act" is the theory of implied contract. (U. R. 415.) The subject matter of the implied contract is the "proprietary interest" devised for enactment *by the Congress* by the Harris

and "Quality Stabilization" bills. The minority of the Supreme Court of Ohio found that a valid "proprietary interest" on goods in commerce may be retained by the proprietor *by fiat of the Ohio Legislature.* The "proprietary interest" thus created and authorized may, in the opinion of the minority of the Ohio Supreme Court (U. R. 418), be "appropriated" like a candy bar.

As will be argued more fully hereinafter, the State of Ohio appears to have taken over the role and powers of Congress in our Federal System.

2. Section 5(a)(5) of the McGuire Act and the parallel provision of the Miller-Tydings Act prohibit horizontal price fixing. The MacLachlan proposal and the Harris Bill proposed to amend Section 5(a)(5) to overturn *United States v. McKesson and Robbins, Inc.*, 351 U. S. 305 (1956).

By Section 1333.29(A),[36] the Ohio law specifically authorizes what Section 5(a)(5) of the McGuire Act prohibits.

3. The MacLachlan proposal and the Harris Bills expressly or impliedly authorized cooperation among distributors and proprietors to maintain the resale price.[37]

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[36] "A proprietor may * * * establish such minimum resale prices for his wholesale distributors, notwithstanding Section 1333.34 of the Revised Code, even though he sells such commodity to retailers in competition with such wholesale distributors, if such sales to retailers are made at prices not less than those he establishes for such wholesale distributors for comparable sales."

[37] The first Harris Bill provided:

"* * * All distributors of the merchandise of the same proprietor sold under the same mark or name may cooperate with him in maintaining the stipulated or minimum prices estab-

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In the interest of the "orderly marketing of goods" by means of resale price maintenance, the Ohio law authorizes proprietors, by contracts or notices, to require "horizontal" cooperation among distributors. Section 1333.29(B).[38] The "proprietor," by virtue of his "proprietary interest" is thereby enabled to keep fair traded goods only within the grasp of those who will agree to observe the resale price.

The "horizontal" cooperative efforts authorized by Section 1333.29(B) frustrate the aims and objectives of the framers of the Miller-Tydings and McGuire Acts which authorize only *vertical* resale price-fixing.[39]

(Continued from preceding page)

lished by him, or his sole distributor specifically authorized for that purpose, and no such cooperation shall constitute an unreasonable or unlawful contract or combination in restraint of trade." *Hearings on H. R. 10527, (Harris Bill) etc.*, (1958), Eighty-fifth Congress, Second Session, at 5. The second Harris Bill narrowly interpreted the ruling of this Court in *McKesson*. H. Rep. No. 467, Eighty-sixth Cong., First Sess. (1959) 19.

[38] Section 1333.29 provides in part:

"(B) Any such *contract or notice* may contain the following provisions:

(2) That the *buyer* will require from any distributor to whom he may resell such commodity an agreement that such *distributor will not, in turn, resell such commodity at less than the minimum resale price stipulated by the proprietor thereof for the level of distribution at which such distributor resells and that such distributor, if he resells to another distributor, will make the same agreement with the distributor to whom he may resell;*

(3) That the *seller* will require from any other distributor to whom he may sell other items of such commodity an agreement that *such distributor will not, in turn, resell such commodity at less than the minimum resale price stipulated by the proprietor for the level of distribution at which such distributor resells and that such distributor, if he resells to another distributor, will make the same agreement with the distributor to whom he may resell.*" (Italics added.)

[39] *E.g.*, 98 Cong. Rec. 8870, Eighty-second Cong., Second Session (1952) (Humphrey); H. Rep. No. 1437, Eighty-second Congress, Second Session (1952) at 3.

The Ohio law also frustrates the aims and objectives of the antitrust laws announced by this Court —that combinations and boycotts which seek to create, maintain or extend price-fixing, with or without benefit of "fair trade," are unlawful under Section 1 of the Sherman Act. *United States v. Bausch and Lomb Co.*, 321 U. S. 707 (1941); *United States v. Frankfort Distilleries, Inc.*, 324 U. S. 293 (1945); *United States v. Parke, Davis and Co.*, 365 U. S. 125 (1961).

4. The rule of the "Masters Mail Order Co. of Washington" cases was sought to be overcome by the *national fair trade* provisions of the MacLachlan proposals and the Harris Bill. All persons with notice, anywhere in the United States would be required to maintain resale prices. House Rep. No. 467, Eighty-sixth Congress, First Sess. (June 9, 1959) at 6-7, 16, 19; MacLachlan, *supra*, 11 Vanderbilt L. Rev. 149, 153.

By the express terms of the Ohio legislation (Sec. 1333.29(B)(1), (2)), the proprietor may thwart the shipment of merchandise from Ohio into the hands of "discounters" inside or outside the State of Ohio. Hence, the interstate "diverter" problem of "fair-traded" merchandise is also sought to be met by the 1959 Ohio law.

The aim of the Ohio legislation, taken almost verbatim from the "purpose clause" of the 1959 version of the Harris Bill, is further clarified by the recital of the legislative policy in Section 1333.27(B):

"Where fair, equitable, and competitive prices cannot be maintained *in all appropriate stages in the distribution of such identified merchandise*, the marketing of such merchandise is depressed and the quantity there-

of moving in the channels of commerce in the state declines." (Italics added.)

The objective of the 1959 law is to "organize the market" for the sale of goods in the course of commerce. The vehicle is the retained "proprietary interest." The Ohio Fair Trade Law authorizes the unlawful "organization of the market" at all levels of distribution by state authorized boycott, by unlawful horizontal price fixing and by the attempted binding of third persons by notice. A single unitary statutory scheme is contemplated, which is reflected in the provisions of the Ohio law.

IV. The legislative history of the Ohio Fair Trade Law is devoid of any attempt to reconcile the statute with the federal fair trade enabling or other legislation.

The record of the legislative hearings before the House Judiciary Committee and the Senate Judiciary Committee of the Ohio Legislature is devoid of any attempt to reconcile the 1959 Fair Trade Law with the limitations of the Miller-Tydings or the McGuire Acts, or any other federal enactment bearing upon the Ohio law.

It would seem clear that the 1959 Ohio Fair Trade Law was never considered in terms of the limitations arising out of the antitrust laws of the United States. Section 1333.29(A) authorizes resale price maintenance in violation of Section 5(a)(5) of the McGuire Act and the ruling by this Court in *United States v. McKesson and Robbins, Inc.*, 351 U. S. 305 (1956). By Section 1333.29(B), horizontal agreements are authorized between distributors, rather than simply "vertical" arrangements between a manufacturer, wholesaler and retailer.

There are few comments upon Section 1333.29(A) and (B). The principal spokesman for the Act, stated:

"Section 29 authorizes contracts of the kind herein contemplated. Sub-section B provides certain additional things which are those things specifically authorized under the McGuire Act which may be included in any written contract.

Sub-section C states explicitly what I think would be implicit in this law, namely that any distributor who is himself bound by a contract with the proprietor is also a third party beneficiary of the contracts between that proprietor and other distributors of the same commodity." (U. R. 212; also U. R. 296)

The explanation for the retention by a "proprietor" of "proprietary interest" pursuant to Section 1333.31 is explained as a mere acknowledgment of "the commercial fact of life" (U. R. 213; also U. R. 297). Any relationship between this provision and the Lanham Act (15 U. S. C. Sec. 1051 *et seq.*) was not discussed.

With reference to the defense established by Section 1333.33 (D) arising from the removal of the trademark, no legislative consideration was given to the possible import of the Federal Food, Drug and Cosmetic Act, 21 U. S. C. §§ 301, *et seq.* The legislative proceedings state:

"In other words, the distributor is only bound if he wants to cash in on the proprietor's good will, but he can't have his cake and eat it, too." (U. R. 214; also U. R. 297.)

The provision of Section 1333.29(A) authorizing a wholesaling manufacturer to set fair trade prices with his competing wholesalers is explained additionally as follows:

"Mr. Gorrell: I can say that very simply. That is to say that a manufacturer—let's say that he wears two hats. He manufactures some products but is also in the wholesale business. He can still fair trade his manufactured product at a fair trade price so long as he doesn't give his own wholesalers any advantages as a result of doing it.

I would say that the reason for that provision, right now—

Mr. Reno: I can't figure it out.

Mr. Gorrell: It says a proprietor may establish minimum resale prices for his wholesale distributor, not with advantage—and so forth—even though he sells such commodity to retailers in competition with distributors. It takes care of the man who sells direct or the man who is both a manufacturer and wholesaler." (U. R. 224.)

It would seem clear that the Supremacy Clause of the Constitution, the federal enabling statutes and any other applicable federal legislation were not seriously considered by the Legislature when the 1959 Fair Trade Act was under advisement.

V. The attempt to bind third persons like appellant, who never bought merchandise from the proprietor by the "contract by notice" provisions of the Ohio law, exceeds any permissible limits of federal enabling legislation.

A. The conception of a "contract" disclosed by the Ohio legislative history is remote from any usual understanding of the term.

Section 5(a)(2) of the McGuire Act provides:

"(2) Nothing contained in this Act or in any of the Antitrust Acts shall render unlawful any *contracts or agreements* prescribing minimum or stipulated prices, or requiring a vendee to enter into *contracts or agreements* prescribing minimum or stipulated prices, for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is free and open competition with commodities of the same general class produced or distributed by others, when *contracts or*

agreements of that description are lawful as applied to intrastate transactions under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale." (Italics added.)

In the views of informed advocates of fair trade, the federal enabling legislation and the state laws, "speak of 'contract' and hence a 'contract' is essential to enforcement of the minimum resale price." The admonition of the *Bausch and Lomb* case, 321 U. S. at 721 has been stressed, along with the further admonition that where the Congress and the Legislatures chose the device of a "contract * * * in determining whether the manufacturer has moved along the right route, it is wise to see whether the manufacturer has actually made a contract." National Wholesale Druggists' Association, *The Basis and Development of Fair Trade*, (3rd Ed., 1955) 32, 91, 92.[40]

In enacting the 1959 Fair Trade Law, the Legislature of Ohio and the sponsors of the statute began with the premise that a lawful fair trade act in the State of Ohio would require a "contract" as a prerequisite to binding any person to observe resale price maintenance. The spokesman for the legislation stated in the House Judiciary Committee of the Ohio Legislature with reference to the decision of the Ohio Supreme Court in the *Bargain Fair* case, 167 Ohio St. 181, 147 N. E. 2d 481 (1958):

"Although it is a little difficult to decide from the opinion what the Supreme Court had in mind, it ap-

[40] John W. Anderson, President, American Fair Trade Counsel, Inc. in the *Hearings Before the Senate Subcommittee on Retailing, Distribution and Fair Trade Practices* of the Small Business Committee (1958), *Competitive Impact of Discount House Operations on Small Business* at page 316 referred to "* * * the somewhat *cumbersome contract system of fair trade.* * * *"

parently objected to a person being bound by the provisions of a contract to which he had in no way been a party. *The Court in no way cast any doubt as to the validity and enforceability of a contract between a producer and a distributor providing minimum prices if the distributor was a party to that.*

"Does House Bill 318 answer the Court's constitutional objection? We think it does." (U. R. 209) (Italics added.)

The approach adopted in the 1959 legislation does not approximate the conception of "contract or agreement." The principal spokesman for the legislation admitted that the statutory provisions made it "pretty hard to find any kind of a contractual relationship." The following colloquy took place:

"Mr. Rudd: Would this be on any stronger ground if instead of implying a contract between the retailer and the manufacturer or proprietor of the trade name, if you implied a contract between the retailer and the one from whom he bought the merchandise for the benefit of the proprietor, a third party beneficiary contract? There you would have escaped, perhaps, from the privity. * * * You have set up a contract between the retailer and someone with whom he has no contractual relationship.

Mr. Gorrell: The reason we have done that, and I recognize it. If we had drafted the legislation in that way, we would have gotten around the problem of the privity of contract, maybe, but the feeling of those who worked on that is this: Then you would be clearly having a—let's suppose that the retailer buys it from a wholesaler, neither one of whom have said anything at all about the stipulated price.

It is pretty hard to find any kind of a contractual relationship. It seems to me that we would have to face up to the privity of contract in order to go back to the man who was going to establish that price. Otherwise there might be an agreement between two

people who never said anything about establishing price." (U. R. 268-269.) (Italics added.)

The absence of "privity of contract" impelled the framers of the Ohio statute to attempt to formulate an "implied contract." The "implied contract" revolves about the conception of a "proprietary interest" retained by the trade-mark owner pursuant to Section 1333.31. The prevailing opinion of the Supreme Court held:

> "It is the intention of the new act to declare and protect the proprietary interest of a manufacturer in his trade-mark and the goodwill attached to it * * *. The means employed by the act is the long and well established legal doctrine of implied contract * * *." (U. R. 423-424.)

In Gorrell and Brown, *A Reexamination of Fair Trade Legislation in the Context of the New Ohio Fair Trade Act and the Decision in Hudson Distribs., Inc. v. Upjohn Co.* (1963), 15 Western Reserve L. Rev. 84, at 95, the "contract by notice," is analogized to an implied contract arising out of the acquisition of a piece of property;[41] *e. g.*, a candy bar (U. R. 418), or an apple.

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[41] "The Legislature found that the only difference between the 'consent' and 'in fact' situations is that in the former, a written contract between the parties exists, while in the latter, a contract arises by reason of the acts of the parties. The Legislature further recognized that nothing new or novel occurs in the establishment of a contract arising out of their acts between certain parties.

"If a person owns a piece of property, for example an apple, he may enter into an agreement with another person to sell that apple for five cents. A binding contract arises and the purchaser is obligated to pay the seller five cents. The seller also may place a sign on his apple saying, 'For Sale—5 cents.' If another person then comes along, reads the notice, and takes and eats the apple, he is equally obligated to pay the seller five cents. This result follows even if the apple eater says to himself while munching the apple, 'I intend to pay only three cents.' *The principle is the same whether the property interest transferred is an apple, a house, an exclusive franchise or license, or a trade-mark or trade name.*" (Italics added.)

The difficulties created by the absence of any "privity" of contract or consensual relationship between "proprietor" and "distributor" were also resolved by reference to the doctrine of "implied warranty." [42]

In sum, the legislative history of the 1959 Fair Trade Law discloses:

> (1) It is "pretty hard" to find a "contractual relationship" in a case like that at bar, that is, where Hudson bought from a third party who, so far as Lilly knows, never said anything about the price;
>
> (2) The statutory "implied contract" arises from a "proprietary interest" reserved to the "pro-

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[42] E. g., U. R. 226; also U. R. 265-266, where the following appears:

"Chairman McGovern: I wonder if in all those instances there isn't a real distinction to be made in the cases where we are talking about the bulk sales law, conditional sales law, if we are not dealing with cases where implied terms are read into a contract that is voluntarily entered into by parties, wherein this proposed law, we are implying the contract itself. There is no contract set by—exempt by implication, regardless of terms.

Mr. Gorrell: I would submit, Miss McGovern, when anybody buys goods, there is a contract, even though it is just a unilateral contract, where they take the goods and pay for them, there is a contractual relationship. We are saying that a part of that contractual relationship is a part of this condition.

I think it is a contract, very simple one. If I go in the store and hand the man a dollar and say, 'Give me the piece of goods,' and he gives it to me, granted it is a contract that is executed right away, but I would think it is a contract.

Chairman McGovern: Very important to this is the remaining question of privity where you are buying this piece of goods at the end of the line and where somebody up at the end of the line has put a trademark on it, the manufacturer.

Mr. Gorrell: I agree.

I think our answer to that has to be that this recent line of cases which our Ohio Supreme Court has joined in the crowd moving that way in saying that privity of contract when you are dealing with anything where there has been publication, in effect, to the public as to what they are buying, the privity of contract is archaic and won't stand in the way of there being a contractual relationship, as in implied warranties." (Italics added.)

prietor" by the Legislature of the State of Ohio upon goods in commerce;

(3) By notice of the establishment of price, a contract arises *in the sense of the doctrine of "implied warranties."*

It follows from the foregoing that in the absence of any "proprietary interest" retained on goods in commerce, in the sense of a piece of tangible property, there would be no "implied contract." The doctrine of "implied warranties" does not *create* a contract, since it is merely a doctrine for facilitating the recovery of damages by an injured tort claimant. *Rogers v. Toni Co.*, 167 O. S. 244, 147 N. E. 2d 612 (1958); Skeel, *Advertised Products Liability* (1959) 8 Cleveland Marshall Law Review 2, at 5.

B. An amendment to the federal enabling legislation is required to give validity to a "notice contract."

Both the House Report on the Harris Bill and the Hearings recognized that specific permission was required before a "contract by notice" affecting commodities in interstate commerce might be valid. H. R. 1253, Eighty-sixth Cong., First Session proposed specifically the amendment of Paragraphs 5(a) (2), (3), and (4) to add a reference to "notice" in the provisions referring to contracts and agreements.

H. Rep. No. 467, Eighty-sixth Cong., First Session stated at page 18:

> "The only change proposed in paragraphs (2) (3) and (4) is to add a reference to 'notices' in the provisions referring to contracts and agreements. This change is made so that where a State law permits a manufacturer to establish a stipulated or minimum resale price by the giving of notice, the McGuire Act provisions will apply to the same extent that they now do in the case of State laws which permit the estab-

lishment of such prices by contracts or agreements between manufacturers and their distributors. The committee has been informed that Virginia has modified its Fair Trade Act so as to permit the establishment of stipulated or minimum prices by notice."

The proponents of the Harris Bill also recognized the desirability of amendment in view of the Virginia legislation and similar contemplated legislation by other states. E.g., Testimony of Herman S. Waller, Counsel, National Association of Retail Druggists, *Hearings on H. R. 10572, etc.*, Eighty-fifth Cong., Second Session, pp. 478, 577.

The legislative history of the McGuire Act consistently refers to "signers" and "nonsigners" of "contracts and agreements." Under the Ohio law, there are now only "contractors." There are no longer "signers" and "nonsigners."

For purposes of fair trade, the mere giving of a notice does not create a "contract." It has accordingly been held in Ohio "that the provision of the 1959 Ohio Act requiring *no* 'contracts or agreements' within the purview of the Miller-Tydings Act or the McGuire Act, would not fall within the scope of such acts and any minimum resale prices established without such 'contracts or agreements' would be in violation of the Sherman Act." *Bulova Watch Co., Inc. vs. Ontario Stores of Columbus, Inc.*, 86 O. L. Abs. 585, 599, 176 N. E. 2d 527, 535 (1961), *aff'd without opinion*, Ct. of App. for Franklin County, June 19, 1962. The result in the *Bulova Watch* case is clearly correct. *Cf.* Derenberg, *Trade Regulation*, N. Y. U. 1958 Annual Survey of American Law, 189; Weston, *Fair Trade, Alias "Quality Stablilization": Status, Problems and Prospects*, 22 ABA Antitrust Section, Vertical Arrangements 76, 92-93 (1963). In discussing the requisites of a "contract," The Basis and Development of Fair Trade (3d Ed., 1955),

published by the National Wholesale Druggists' Association states (32-33):

> "mere notice without such assent will not do. Assent to fair trade prices and agreement to observe them will not be implied from a legend upon an invoice which accompanies the goods and the retention of the goods by the buyer."

Hoffman-La Roche, Inc. v. Weissbard, 19 N. J. Super., 210, 88 A. 2d 238 (1952), *affirmed* 11 N. J. 541, 95 A. 2d 398 (1953); *Johnson & Johnson v. Charmley Drug Co.*, 11 N. J. 526, 95 A. 2d 391 (1953).

C. The Virginia Courts have declined to give effect to a "notice contract" under the circumstances of this case.

The Virginia Courts, including the Supreme Court of Virginia, have construed the 1958 Virginia Fair Trade Law as not binding upon a third person who does not acquire the merchandise directly from the "proprietor."

In *Bulova Watch Co., Inc. v. Zale-Norfolk, Inc.* (Number 2570, Court of Law and Chancery in the City of Norfolk)[43] Bulova sold merchandise directly to the defendant until the end of 1960. In the spring of 1961, Bulova mailed a minimum retail price list to the respondent. At the trial, Bulova offered in evidence a fair trade agreement dated November 8, 1960, with another retailer. Defendant admittedly sold complainant's commodity below the minimum retail price set forth in the price list mailed by complainant.

The Court found as a fact "that the evidence shows that the respondent had actual notice of the minimum retail price of complainant's commodity which constituted an offer"; and that respondent, Zale-Norfolk, Inc., obtained Bulova watches from a source other than

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[43] Certified copy of Opinion reprinted in full in Appendix B hereto.

the complainant. Over plaintiff's objection the Court declined to receive evidence as to defendant's exact source of the goods, other than that it had not purchased directly from Bulova.

In denying relief to Bulova, the Court held:

"In the latter case (*Standard Drug v. General Electric*), General Electric shipped its commodity bearing its trade mark to Standard Drug at a time when the latter had in its possession a list of the fair trade minimum retail prices. In the instant case, the court is of the opinion that the evidence shows that the respondent had actual notice of the minimum retail prices of the complainant's commodity which constituted an offer. *However, the respondent obtained the complainant's commodity from a source other than the complainant.*

"The court is of the further opinion that *the receipt of the commodity from a source other than the manufacturer cannot be deemed an acceptance by the respondent, for the respondent was not a party to the agreement or in privity with either of the parties, and the Fair Trade Act is limited to voluntary agreements. To hold otherwise would be to write into the law that which has been removed from it, to-wit: the 'non-signer' provision.*" (Italics supplied.)

The Supreme Court of Virginia denied review on March 1, 1962.[44]

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[44] Appendix B, pp. 102-103, *infra*:

"The petition of Bulova Watch Company, Inc., a New York corporation, for an appeal from a decree entered by the Court of Law and Chancery of the City of Norfolk on the 7th day of September, 1961, in a certain chancery cause then therein depending, wherein the said petitioner was plaintiff and Zale-Norfolk, Inc., t/a Zale's Jewelers, was defendant, *having been maturely considered and a transcript of the record of the decree aforesaid seen and inspected, the court being of opinion that the said decree is plainly right,* doth reject said petition, and refuse said appeal, the effect of which is to affirm the decree of the said Court of Law and Chancery." (Italics supplied.)

The Virginia courts have confined the ruling in *Standard Drug* to its proper facts—the direct sale of merchandise from the fair trader to the defendant *under circumstances where defendant's consent to the fair trading might possibly be inferred.*[45]

The Virginia holding even in *Standard* does not accord with the general law. A notice does not create a "contract or agreement" within the meaning of the federal enabling legislation:

> "Mere notice without such assent will not do. Assent to fair trade prices and agreement to observe them will not be implied from a legend upon an invoice which accompanies the goods and the retention of the goods by the buyer."
>
> The National Wholesale Druggists' Association, *The Basis and Development of Fair Trade* (3rd Ed., 1955) pp. 32-33.

At common law, a third person with notice of a resale price maintenance agreement between two others would not be bound by "notice" of the contract. The Massachusetts Supreme Court held that, even though a manufacturer of a drug invariably sold it under a contract that the purchaser would observe a minimum resale price, a "nonsigner" retailer who in some way had obtained a

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[45] The limitation inherent in the Virginia Fair Trade Act was recognized by the Brief of the General Electric Company in *Standard Drug Company, Inc. v. General Electric Company,* 202 Va. 367, 117 S. E. 2d 289 (1960), *app. dism.,* 368 U. S. 4 (1961) at 34.

> "Here, we repeat that in this case we are not concerned with a retailer who may have acquired the commodity without notice of the restriction, or even one who acquired the commodity from an intermediary. We are dealing with a retailer in direct privity with the manufacturer, one who bought *directly* from the manufacturer and one who admits *actual* notice (not simple notice by way of a statement attached to the container, but notice by letter) * * *."

quantity of the product could not be restrained from cutting the price. *Garst v. Hall & Lyon Co.*, 179 Mass. 588, 61 N. E. 219 (1901).

VI. The Ohio Legislature has exceeded any permissible limits of state power (a) in attempting to separate the trade-mark from the commodity in the course of interstate commerce, and (b) in impliedly authorizing the removal of labels from drugs in commerce.

A. The State of Ohio has sought to introduce a new concept of trade-mark law.

In comments both upon the Harris Bill and the "Quality Stabilization" Bills, the Department of Justice, the Federal Trade Commission, and other agencies of Government have expressed concern at the revolution proposed to be effected in our property concepts.[46] The theory of the Harris Bill, incorporated into the Ohio law, was that a "proprietary interest" was to be retained by the proprietor in the *fair-traded commodity*. The theory of the later Quality Stabilization Bills is that the owner of the brand, name or trade-mark is to retain an interest in the *brand, name or mark* itself, as the commodity wends its way through successive channels of commerce.

What has been proposed by these Bills to be accomplished by Act of Congress under the "commerce clause," the State of Ohio has attempted to accomplish by Act of the Legislature.

The contention that a trade-mark might have an existence independent from the good will of the business to

[46] H. Rep. No. 467, Eighty-sixth Cong., First Sess. (1959) on H. R. 1253 ("Harris Bill") 25-30; H. Rep. No. 566, Eighty-eighth Cong., First Sess. (1963) on H. R. 3669 ("Quality Stabilization") 17-28.

which it appertains or the commodity to which it is applied had been made in litigations in which the Sunbeam Corporation asserted that a tort had been committed by the sale of its products below the manufacturer's stipulated price. This contention has been summarily and uniformly rejected. *Sunbeam Corp. v. Wentling*, 192 F. 2d 7 (C. A. 3, 1951); *Sunbeam Corp. v. Pay Less Drug Stores*, 113 F. Supp. 31 (N. D., Calif., 1953).

The most ardent advocates of fair trade have been unable to find any basis in law for the kind of "proprietary interest" attempted to be reserved by a proprietor upon commodities in interstate commerce. In the 1959 Congressional Hearings (*Hearings on H. R.* 768, *etc.*, H. Rep., Eighty-sixth Cong., First Sess.) John W. Anderson, President, American Fair Trade Association, and President, Quality Brands Association of America, Inc. refused to endorse the Harris Bill (653-654). Said Mr. Anderson:

> "I want you to note carefully in the Harris bill one thing. I will go no further. *That is that the Harris bill endeavors to establish a hitherto undreamed of proprietary interest of the manufacturer in the product itself, continuing after its sale and delivery and through the various steps of distribution. We have sought diligently, but have found absolutely no basis in established law for that concept.* We found nothing to indicate which way Federal courts would move when asked to support this novel concept of law."

The Lanham Act, 15 U. S. C., Section 1127 has made clear the intention that the subject of trade-marks in commerce has been pre-empted by the Congress.

The section states in part:

> "The intent of this chapter is to regulate commerce within the control of Congress by making actionable the deceptive and misleading use of marks in such

commerce; to protect registered marks used in such commerce from interference by State, or territorial legislation; * * *"

It has been held that the Lanham Act manifests a Congressional intent to pre-empt the field of fair trade-marks in commerce. In *Time, Inc. v. T. I. M. E. Inc.*, 123 F. Supp. 446 (S. D., Calif., 1954) the Court stated at page 452:

"Nor is there any room to view state law as complementary to the Lanham Act in the face of undoubted Congressional intent to occupy completely a field to the full extent constitutionally permissible. Cf. Missouri Pacific R. Co. v. Porter, 1927, 273 U. S. 341, 345-346, 47 S. Ct. 383, 71 L. Ed. 672; McDermott v. Wisconsin, 1913, 228 U. S. 115, 132-133, 33 S. Ct. 431, 57 L. Ed. 754."

Accord: Diggins, *Federal and State Regulation of Trade-Marks* (1949), 14 Law and Contemporary Problems 200, esp. 206-207, 213-215, 219.

The legislative history of the McGuire Act does not warrant the interpretation that either the McGuire Act or the Lanham Act was to operate as a source of new and independent authority to the states for the transformation of a trade-mark into *an entity separated from either the good will of the business or as affixed to the commodity so that the "proprietary interest" would thereby achieve a separate status of an apple, a candy bar, or any other piece of tangible property.*

This Court has held in *United States v. Univis Lens Co.*, 316 U. S. 241, at 250 (1942), that a patentee could not control the alienability of his commodity after he had sold it:

"* * * his monopoly remains so long as he retains ownership of the patented article but the sale of it ex-

hausts the monopoly in that article and the patentee may not thereafter, by virtue of his patent control the use or disposition of that article." (Citing authorities.)

Ethyl Gasoline Corp. v. United States, 309 U. S. 436 (1940).

As for owners of trade-marks *a fortiori* they cannot do what is forbidden to a patentee. *United States v. Bausch & Lomb Co.*, 321 U. S. 707, 721 (1944); Handler, *Trade-Marks and Antitrust Laws*, (1948) 37 Trade Mark Reporter 387, 397-399.

The bill enacted by the Legislature of Ohio would repeal the established law of copyrights and patents. Price fixing powers which this Court has denied to holders of patents and copyrights, the State of Ohio would confer upon holders of trade marks and trade names.

The Lanham Act has made perfectly plain that its purpose was to eliminate and avoid such interference by the states with the rights in trade-marks declared by the Congress.

B. The State of Ohio has Impliedly Authorized the Tortious and Unlawful Removal of Labels From Drugs in Commerce.

The retailer's obliteration of Lilly's trade-marks would be tortious and unlawful. The suggestion of Section 1333.33 (D)[47] that the retailer may achieve a "full" vesting

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[47] "Sec. 1333.33. It shall be a defense to an alleged violation of section 1333.32 of the Revised Code, for a distributor to prove that a commodity has been advertised, offered for sale, or sold:

* * * * *

(D) After the distributor has removed from such commodity all trace of the proprietor's identifying trade-mark or trade name and that in such sale or offer to sell or advertisement for sale no statement, representation, or suggestion of any kind is made which would identify such commodity with the trade-mark or trade-name of the proprietor."

of title in the commodity by obliterating the trade-mark is fairly impossible of achievement. The retailer will have committed the tort of unfair competition and also be in violation of federal and state drug laws forbidding the obliteration or concealment of trade-marks.

Circuit Judge Goodrich in *Sunbeam Corporation v. Wentling*, 192 F. 2d 7, at 8 (1951), showed how the obliterator of trade-marks who "passed off" Lilly's goods as his own would find himself in serious trouble as a tort-feasor.

Said the Court:

> "* * * Sunbeam says that if Wentling wants to sell its razors below the established price he should take off the identifying trade-mark. Suppose he did. He certainly could not put on his own mark and sell Sunbeam razors as his, Wentling's. And if he sold them with no mark at all but just as 'good electric razors' could not Sunbeam, on the very argument it makes here, complain that Wentling was interfering with its trade-mark by not allowing the customer to know that the good razor which he buys from Wentling is in fact made by Sunbeam? If Sunbeam's argument made to us is sound, we do not see why the other conclusion would not follow. * * * "

The Federal Food, Drug, and Cosmetic Act prohibits (21 U. S. C., Section 331(b)) the "misbranding of any food, drug, device, or cosmetic in interstate commerce."

21 U. S. C., Section 352(a) defines a drug as misbranded "if its label is false or misleading in any particular"; and by Section 352(b)(1) a drug is misbranded "If in package form unless it bears a label containing (1) the name and place of business of the manufacturer, packer, or distributor;" The laws of Ohio contain the same definitions of "misbranded drugs." O. R. C. Section 3715.64 (A)(1), (2)(a).

The removal of labels on drugs is contrary to the national policy expressed by the provisions of the Federal Food, Drug, and Cosmetic Act, 21 U. S. C. A., Section 331 (k),[48] and may well be criminal. *United States v. Sullivan*, 332 U. S. 689 (1948).

It would seem then that the invitation of the Ohio Legislature to the retailer to misbrand Lilly drugs as his own, is an invitation to civil and penal liability. The fairly cynical character of a proposal to obliterate trademarks was recognized by the proponents of the first Harris Bill during the Hearings thereon.[49]

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[48] "Sec. 331. The following acts and the causing thereof are prohibited:

(k) The alteration, mutilation, destruction, obliteration, or removal of the whole or any part of the labeling of, or the doing of any other act with respect to, a food, drug, device, or cosmetic, if such act is done while such article is held for sale (whether or not the first sale) after shipment in interstate commerce and results in such article being adulterated or misbranded."

[49] Testimony of Herman Waller, Counsel, National Association Retail Druggists, Hearings before a Sub-Committee of the Committee on Interstate and Foreign Commerce, House of Representatives, 85th Cong., 2d Sess. on H. R. 10527, etc. (Harris Bill) 577:

"If he does not want to use the trademark of the manufacturer, let him scrub it off and sell it without it. He can do that if he wants to.

Of course, he may run up against the defacement of trademarks, but that is another story but that is the purpose of the act, and that is what you are trying to do here, to protect that property right against being abused, abused by retailers who seek that little edge of getting something lower, lower, lower." (Italics added.)

VII. The 1959 Ohio Fair Trade Law accomplishes a deprivation of due process under the Fourteenth Amendment by reason of an uncontrolled and arbitrary delegation of power over the property and business lives of others without any procedural safeguards.

Appellant bought and paid for commodities with the Lilly trade-marks thereon from a wholesaler in Michigan where the nonsigner clause of the Michigan Fair Trade Act is ineffective. *Shakespeare Co. v. Lippman's Tool Shop Sporting Goods Co.*, 343 Mich. 109, 54 N. W. (2d) 268 (1952). By the law of Ohio, part of Appellant's interest in the Lilly commodities is transferred to Lilly despite the intervening sales.

The retention of the "proprietary interest" in the commodity by the "proprietor" is made mandatory by the terms of Section 1333.31 so long as the commodity is identified by the trade-mark or trade name of the "proprietor." [50] The mandatory definition, moreover, encompasses every trade name or trade mark of the "proprietor,"

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[50] Sec. 1333.31 provides:

"A proprietor *shall* retain a proprietary interest in any commodity with respect to which he is a proprietor after he has sold it to distributors, so long as such commodity continues to be identified by his trademark or trade name, by reason of his interest in stimulating demand for such commodity through effective distribution to ultimate consumers and of his interest in continuing protection of the good will associated with his trade-mark or trade name."

Section 1333.28 (G) and (H), defining "trade-mark" and "trade name" provide:

" 'Trade-mark' means any word, name, symbol, or device, or any combination thereof, used by a producer or distributor to identify his commodity and distinguish it from that produced or distributed by others.

'Trade name' means personal names, and any word, words, symbol, or symbols, used by producers or distributors to identify their companies, firms, or corporations."

whether he be a "sham" or "token enforcer" of resale price maintenance[51] or a vigorous enforcer; or whether the trade-mark or trade name be "strong" or "weak" or "misleading" or the subject of pending injunction or cancellation proceedings, etc.

The "proprietary interest" is given life, however, only upon the arbitrary decision of the "proprietor" to "fair trade" the commodity. The "proprietary interest" ceases upon the unilateral decision of the "fair trader" to abandon resale price maintenance.

The proprietor's power of decision upon the retention of a "proprietary interest" is matched by the unilateral power given by the statute to the trade-mark owner over the business life of others. By Section 1333.29 (B) (2) and (3), in his sole unfettered discretion, the "proprietor" can by notice or contract deputize and compel every person in his distribution system to assist in the enforcement of fair trade prices, both inside and outside of Ohio. The stream of interstate and intrastate commerce at wholesale and retail levels may be effectively dammed up unless resale is effected to persons and within lines demarcated by the proprietor, i.e.:

> (a) resale by the initial vendee at the fair trade price for his particular level of distribution; and
>
> (b) resale to subsequent vendees who observe fair trade at their respective levels of distribution, and who will in turn require observance by their subsequent vendees.

In *Old Dearborn Distributing Company v. Seagram Distillers Corp.*, 299 U. S. 183 (1936) the statute before this Court permitted only resale price maintenance. This

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[51] Note: *The Operation of Fair Trade Programs* (1955) 69 Harv. L. Rev., 316, 331-332.

Court held that such a statute does not unlawfully delegate legislative authority, nor does it violate due process.

The Ohio statute goes much further. It gives an arbitrary power to one person to generate property interests in goods bought by another, as well as power to regulate the business life of such other.

Failing to abide by such private regulation, a retailer faces the possibility of litigation from every beneficiary of the notice including (a) the proprietor of the trade-mark, and (b) every other person who has either signed a fair trade contract, or (c) who has been served with a notice which also includes a business restriction. Revised Code, Section 1333.29(B)(3).

The conferring by the State of Ohio of an unrestrained discretion upon "proprietors" over the business life of others in the use of their property, in addition to the control of the resale price, clearly constitutes an unlawful delegation of legislation to private persons without any procedural safeguards or standards whatsoever.

As this Court stated in *Carter v. Carter Coal Co.*, at 298 U. S. 238, 311 (1936):

> "The power conferred upon the majority is, in effect, the power to regulate the affairs of an unwilling minority. This is legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business. The record shows that the conditions of competition differ among the various localities. In some, coal dealers compete among themselves. In other localities, they also compete with the mechanical production of electrical energy and of natural gas. *Some coal producers favor the code; others oppose it; and the record clearly indicates that this diversity of*

view arises from their conflicting and even antagonistic interests. The difference between producing coal and regulating its production is, of course, fundamental. The former is a private activity; the latter is necessarily a governmental function, *since, in the very nature of things, one person may not be intrusted with the power to regulate the business of another, and especially of a competitor.* And a statute which attempts to confer such power undertakes an intolerable and unconstitutional interference with personal liberty and private property. The delegation is so clearly arbitrary, and so clearly a denial of rights safeguarded by the due process clause of the Fifth Amendment, that it is unnecessary to do more than refer to decisions of this Court which foreclose the question." (Italics added.)

The history of fair trade shows strong opposition to fair trade legislation from many segments of retail business. Report of the Select Committee on Small Business on *"Fair Trade: The Problem and the Issues,"* H. Rep. No. 1292, Eighty-second Cong., Second Sess. (1952), at 22 to 24; Federal Trade Commission, Report on Resale Price Maintenance (1945) 61. The hearings of the last several years indicate a division of opinion in retailing similar to that of a decade ago.

As in the case at bar, the interest of the fair trading "proprietor" and its retailing friends may be wholly at variance with the interests of those like Hudson, whose prices and business practices are sought to be regulated—to their great detriment.

This Court has recently manifested its concern for securing opportunities of procedural due process where, by private action, grave harm may be inflicted upon others. Cf. *Silver v. New York Stock Exchange,* 373 U.S. 341 (1963). In the last ten years many states have held that their respective state constitutions prohibit such

a delegation of legislative authority. Conant, *Resale Price Maintenance: Constitutionality of Nonsigner Clauses* (1961), 109 U. of Penn. L. Rev. 539, 545-553. Where the State of Ohio has delegated to private persons the authority to inflict great harm upon others, without any procedural safeguards and without any standards or opportunity for hearing and adjudication, rights of procedural due process granted by the Fourteenth Amendment would appear to have been violated.

As was held in *Browning v. Hooper*, 269 U. S. 396, 405 (1926):

> "* * * It is essential to due process of law that such owners be given notice and opportunity to be heard on that question where, as here, the district was not created by the Legislature, and there has been no legislative determination that their property will be benefited by the local improvement. Appellants were denied all opportunity to be heard. No officer or tribunal was empowered by the law of the state to hear them, or to consider and determine whether the road improvements in question would benefit their lands. The act is repugnant to the due process clause of the Fourteenth Amendment."

Accord; Washington ex rel. Seattle Trust Co. v. Roberge, 278 U. S. 116, 122 (1928); *Carter v. Carter Coal Co.*, 298 U. S. 238, 311 (1936); Note, *Delegation of Power to Private Parties*, 37 Colum. L. Rev. 447, 458 (1937); Jaffe, *Law Making by Private Groups*, 51 Harv. L. Rev. 201, 217 (1938).

Since so many state courts have declined to give effect to the reasoning and philosophy of the *Old Dearborn* case, it is urged that this Court reconsider its views in that case.

CONCLUSION.

Appellant prays that this Honorable Court, in the exercise of its jurisdiction pursuant to 28 U. S. C., Section 1257(2), reverse the judgment of the Supreme Court of Ohio, and declare, for the reasons herein set forth, that Ohio Rev. Code, Sections 1333.27 through 1333.34 is unconstitutional by reason of conflict with the Supremacy Clause of the Constitution of the United States and violation of the Due Process Clause of the Fourteenth Amendment.

Respectfully submitted,

MYRON N. KROTINGER,
LEONARD LANE,
MORTON L. STONE,
300 Chester-Twelfth Building,
Cleveland 14, Ohio,
Attorneys for Appellant.

APPENDIX A.

CONSTITUTIONAL PROVISIONS INVOLVED.

Article VI, Clause 2—*Supremacy Clause.*

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Amendments, Article XIV, Section 1—*Due Process Clause.*

* * * nor shall any State deprive any person of life, liberty, or property, without due process of law.

STATUTES INVOLVED.

Miller-Tydings Amendment to Sherman Act.

"Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: *Provided*, That nothing herein contained shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trade-mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory,

or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under Section 5, as amended and supplemented, of the Act entitled 'An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes,' approved September 26, 1914: *Provided further,* That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other * * *."

The McGuire Act.

"SEC. 5(a) (1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.

(2) Nothing contained in this Act or in any of the Antitrust Acts shall render unlawful any contracts or agreements prescribing minimum or stipulated prices, or requiring a vendee to enter into contracts or agreements prescribing minimum or stipulated prices, for the resale of a commodity which bears, or the label or container of which bears, the trade-mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions under any statute, law, or public policy now or hereafter in effect in any State,

Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale.

(3) Nothing contained in this Act or in any of the Antitrust Acts shall render unlawful the exercise or the enforcement of any right or right of action created by any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia, which in substance provides that willfully and knowingly advertising, offering for sale, or selling any commodity at less than the price or prices prescribed in such contracts or agreements whether the person so advertising, offering for sale, or selling is or is not a party to such a contract or agreement, is unfair competition and is actionable at the suit of any person damaged thereby.

(4) Neither the making of contracts or agreements as described in paragraph (2) of this subsection, nor the exercise or enforcement of any right or right of action as described in paragraph (3) of this subsection shall constitute an unlawful burden or restraint upon, or interference with, commerce.

(5) Nothing contained in paragraph (2) of this subsection shall make lawful contracts or agreements providing for the establishment or maintenance of minimum or stipulated resale prices on any commodity referred to in paragraph (2) of this subsection, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other."

Ohio Fair Trade Act of 1959.

(Ohio Revised Code Sections 1333.27 through 1333.34.)

Sec. 1333.27. (A) Sections 1333.27 to 1333.34, inclusive, of the Revised Code are enacted in the exercise of the police powers of the state and in pursuance of the power specifically granted the general assembly by the people in Section 2 of Article XIII, Ohio Constitution, to regulate the sale and conveyance of personal property, and the purposes of Sections 1333.27 to 1333.34, inclusive, of the Revised Code, are generally to protect and preserve small business, to safeguard the good will of trade-marks and trade names, to further wholesome competition, to prevent monopoly in the distribution of goods, and to promote the public welfare by securing wider distribution of commodities and an increase in the production thereof, and thereby reducing production and distribution costs, protecting and increasing gainful employment in manufacturing, wholesaling and retailing all for the benefit of the consumer and the well-being of the citizens of the state.

(B) It is the further purpose of Sections 1333.27 to 1333.34, inclusive, of the Revised Code, to promote the distribution in commerce in the state of identified merchandise which is in free and open competition with other articles of the same general class. Where fair, equitable, and competitive prices cannot be maintained in all appropriate stages in the distribution of such identified merchandise, the marketing of such merchandise is depressed and the quantity thereof moving in the channels of commerce in the state declines.

(C) To remove obstructions to the marketing of identified merchandise in commerce which are occasioned by unfair selling practices, it is the policy of the state to

afford distributors of identified merchandise an effective means whereby the sale of such merchandise at all appropriate stages of distribution may be consummated at prices adequate to stimulate distribution and low enough to enable distributors of such identified merchandise to compete effectively with those marketing other goods, who by size and dominance may distribute such goods through their own retail outlets or by franchise or consignment methods, and to satisfy the needs of ultimate consumers.

Sec. 1333.28. As used in Sections 1333.27 to 1333.34, inclusive, of the Revised Code:

(A) "Commodity" means any subject of commerce.

(B) "Producer" means any grower, baker, maker, manufacturer, bottler, packer, converter, processor, or publisher.

(C) "Wholesaler" means any person selling a commodity other than a producer or retailer.

(D) "Retailer" means any person engaged in business selling a commodity to consumers for use.

(E) "Distributor" means any person who acquires a commodity for the purpose of resale.

(F) "Person" means an individual, corporation, partnership, association, joint-stock company, business trust, or any unincorporated organization.

(G) "Trade-mark" means any word, name, symbol, or device, or any combination thereof, used by a producer or distributor to identify his commodity and distinguish it from that produced or distributed by others.

(H) "Trade name" means personal names, and any word, words, symbol, or symbols, used by producers or distributors to identify their companies, firms, or corporations.

(I) "Contract" means any agreement, written or verbal, or arising from the acts of the parties. The establishment by a proprietor of a minimum resale price for any commodity pursuant to the provisions of Section 1333.29 of the Revised Code and the proprietor's permission for a distributor to acquire and use the proprietor's interest in the trade-mark or trade name in reselling the commodity shall constitute a contract and sufficient consideration from the proprietor for a promise by the distributor not to sell such commodity at less than the minimum price established by the proprietor. Any distributor (whether he acquires such commodity directly from the proprietor or otherwise) who, with notice that the proprietor has established a minimum resale price for a commodity, accepts such commodity shall thereby have entered into an agreement with such proprietor not to resell such commodity at less than the minimum price stipulated therefor by such proprietor.

(J) "Notice" means actual notice given by any method provided in Section 1333.30 of the Revised Code, or otherwise established by legally admissible evidence.

(K) "Proprietor" means:

(1) A person who identifies a commodity produced by him by the use of his trade-mark or trade name, unless he has specifically granted to another person sole authority to establish minimum resale prices for such commodity;

(2) A person who identifies a commodity distributed by him by the use of his own trade-mark or trade name;

(3) A person who has been specifically granted by the producer or distributor of a commodity which is identified by the trade-mark or trade name of such producer or distributor the sole authority to establish

minimum resale prices for such commodity in the state.

Sec. 1333.29. (A) It shall be lawful, anything in Sections 1331.01 to 1331.14 of the Revised Code or otherwise provided in the Revised Code to the contrary notwithstanding, for a proprietor to establish and control by notice to distributors or by contract, stipulated minimum resale prices for a commodity of which he is the proprietor and which is in free and open competition with commodities of the same general class produced by others and offered for sale in the same general market area. Such minimum resale prices may be differentiated as to various levels of distribution, provided such differentiations are not otherwise unlawfully discriminatory. Such prices may be changed from time to time by written notice to distributors who acquired such commodity with notice of any established minimum resale price. A proprietor may so establish such minimum resale prices for his wholesale distributors, notwithstanding Section 1333.34 of the Revised Code, even though he sells such commodity to retailers in competition with such wholesale distributors, if such sales to retailers are made at prices not less than those he establishes for such wholesale distributors for comparable sales.

(B) Any such contract or notice may contain the following provisions:

(1) That the buyer will not resell such commodity at less than the minimum resale price stipulated by the proprietor thereof for the level of distribution at which the buyer resells the same;

(2) That the buyer will require from any distributor to whom he may resell such commodity an agreement that such distributor will not, in turn, resell such commodity at less than the minimum resale

price stipulated by the proprietor thereof for the level of distribution at which such distributor resells and that such distributor, if he resells to another distributor, will make the same agreement with the distributor to whom he may resell;

(3) That the seller will require from any other distributor to whom he may sell other items of such commodity an agreement that such distributor will not, in turn, resell such commodity at less than the minimum resale price stipulated by the proprietor; for the level of distribution at which such distributor resells and that such distributor, if he resells to another distributor, will make the same agreement with the distributor to whom he may resell.

(C) Any contract or notice authorized by and entered into pursuant to any of the provisions of Sections 1333.27 to 1333.34, inclusive, of the Revised Code, shall be for the benefit of the proprietor and any distributor who is bound by a similar contract or notice.

Sec. 1333.30. Actual notice of stipulated minimum resale prices may be given to any person by mail, through advertising, or through notice attached to merchandise, to containers, packages, or dispensers thereof, or on the invoice therefor, or imparted orally. Deposit in the United States mail, with postage prepaid, of a letter properly addressed to a distributor and specifying minimum resale prices established by a proprietor shall constitute prima facie evidence of actual notice to said distributor of such resale prices. The acquisition of or dealing in merchandise clearly marked, or enclosed in containers, packages or dispensers clearly marked, or the invoice for which was clearly marked, with minimum resale prices established by a proprietor shall be conclusive evidence of actual notice of such minimum resale prices. Actual notice may also be otherwise established by legally admissible evi-

dence. A person with actual notice of any applicable minimum resale price is thereby charged with notice that such a price is subject to change.

Sec. 1333.31. A proprietor shall retain a proprietary interest in any commodity with respect to which he is a proprietor after he has sold it to distributors, so long as such commodity continues to be identified by his trade-mark or trade name, by reason of his interest in stimulating demand for such commodity through effective distribution to ultimate consumers and of his interest in continuing protection of the good will associated with his trade-mark or trade name.

Sec. 1333.32. (A) Except as provided in Section 1333.33 of the Revised Code, it shall be unlawful and an act of unfair competition for any distributor with notice that a proprietor has established a stipulated minimum resale price for a commodity of which he is the proprietor or for any distributor who is in contract with a proprietor not to sell a commodity for which such proprietor has established a stipulated minimum resale price, at less than such stipulated minimum resale price to sell, offer to sell, or advertise such a commodity for sale at a price lower than such stipulated minimum resale price. In determining whether the sale or offer to sell or advertisement for sale of any commodity is below the stipulated minimum resale price established by the proprietor for such commodity there shall be deducted from the price at which such commodity is sold, offered for sale, or advertised for sale the value of any article or thing of exchange or extrinsic value or any concession made, whether by the giving of coupons or otherwise, which is given or to be given in connection with such sale or offering to sell and the sale or offering for sale of such commodity with any other commodity for a

single or combined price, or the giving of or offering to give any credit or allowance in excess of the actual market value thereof, or the failure to add any tax occasioned by or upon the sale of such commodity shall also be taken into consideration in determining whether such sale, offer to sell, or advertisement for sale is below the minimum resale price stipulated for such commodity by the proprietor; provided the allowance by a distributor to his customers of trading stamps or other redeemable certificates, when the amount or value of such allowance does not exceed three per cent of such stipulated minimum resale price, where the posted or advertised price of any commodity or commodities is not less than the stipulated minimum resale price thereof, shall not constitute the offering or making of a gift or concession prohibited by this section nor a violation of any of the provisions of Sections 1333.27 to 1333.34, inclusive, of the Revised Code.

(B) Any person suffering or reasonably anticipating damage by reason of a violation of this section may bring suit in any court of competent jurisdiction in the state to

(1) Recover the amount of damages sustained as a result thereof;

(2) Obtain injunctive relief whether or not specific monetary damages are established;

(3) Recover the costs of suit, including reasonable attorney fees, which costs and attorney fees may be recovered whether or not specific monetary damages are established.

(C) It shall be no defense to a prayer for an injunction in any such action that there is an adequate remedy at law.

Sec. 1333.33. It shall be a defense to an alleged violation of Section 1333.32 of the Revised Code, for a distributor to prove that a commodity has been advertised, offered for sale, or sold:

(A) In closing out such distributor's stock of such commodity for the bona fide purpose of discontinuing dealing in such commodity and plain notice of that fact is given to the public; provided, the distributor of such stock shall give to the proprietor of such commodity prompt and reasonable notice in writing of his intention to close out such stock, and an opportunity to purchase such stock of such commodity at the original invoice price;

(B) When the stock of such commodity is altered, secondhand, damaged, defaced, or deteriorated and plain notice of that fact is given to the public in the advertisement and sale thereof, such notice to be conspicuously displayed in all advertisements and affixed to the commodity;

(C) By an officer acting under an order of court;

(D) After the distributor has removed from such commodity all trace of the proprietor's identifying trade-mark or trade name and that in such sale or offer to sell or advertisement for sale no statement, representation, or suggestion of any kind is made which would identify such commodity with the trade-mark or trade name of the proprietor.

Sec. 1333.34. Sections 1333.27 to 1333.34, inclusive, of the Revised Code, shall not, except as otherwise specifically provided in Section 1333.29 of the Revised Code, apply to any contract, agreement, or understanding between or among producers, or between or among distributors, or between or among wholesalers.

APPENDIX B.

Letter Opinion from Judge Walter A. Page, Judge of the Court of Law and Chancery of the City of Norfolk to Counsel in Bulova Watch Company vs. Zale-Norfolk, Inc.

COURT OF LAW AND CHANCERY
OF THE CITY OF NORFOLK
Norfolk, Virginia

August 18, 1961

Mr. John D. Leitch, Jr.
Board of Trade Building
Norfolk, Virginia

Mr. Herman A. Sacks
Sacks, Sacks & Jordan
Bank of Commerce Building
Norfolk, Virginia

Re: Bulova Watch Company, Inc., a New York Corporation v. Zale-Norfolk, Inc., T/A Zale's Jewelers, a Virginia Corporation
File #2570

Gentlemen:

In setting forth the conclusions of the court reached in the above-styled matter, a brief review of the evidence is proper,

The complainant, Bulova Watch Company, Inc., sold to the respondent, Zale-Norfolk, Inc., trading as Zale's Jewelers, until the end of 1960. In the spring of 1961 the complainant sent a minimum retail price list to the respondent by mail. The district manager of the respondent denied knowledge of its receipt. Complainant offered in evidence, over the objection of counsel for the respondent, a fair trade agreement dated November 8, 1960,

between the complainant and Kingoff's of Roanoke, Inc. The respondent does not deny selling the complainant's commodity below the minimum retail prices as set forth in the hereinabove referred-to list.

The complainant contends that in accordance with section 59-8.2(10) the respondent had actual notice and that by acceptance of the commodity from any source, whether the manufacturer, wholesaler or retailer, and the resale of same below the minimum retail prices fixed by the manufacturer, unfair competition resulted in violation of the provisions of The Fair Trade Act of Virginia and prays injunctive relief.

The respondent contends that the contract with Kingoff's is irrelevant and not binding on the respondent; that there was no contract, either expressed or implied, between the parties; and that even if the mailing of the retail price list is deemed an offer which the respondent denies, there was no acceptance by the respondent because the respondent had not received or accepted any commodities from the complainant since 1960.

The court is of the opinion that the contract with Kingoff's is inapplicable in that the respondent was not a party thereto and, therefore, the court is not called upon to pass on the question of whether or not that contract is in accordance with the provisions of The Fair Trade Act, and, more particularly, the provisions of section 59-8.3 (Code, 1950, as amended).

There being no written contract, the question before the court is whether there was a voluntary agreement, that is, an offer and an acceptance. In *Benrus Watch Company v. Kirsch*, 198 Va. 94, the court held that the "non-signer" provision (section 59-7, Code, 1950) of the then Fair Trade Act (Chapter 1, Title 59, Code, 1950) was in conflict with and repealed by section 59-20 and section 59-40,

Code 1950, of the Anti-Monopoly Act. The court found it unnecessary to determine whether the "non-signer" provision then embodied in section 59-7 was unconstitutional.

In *Standard Drug v. General Electric*, 202 Va. 367, the court held that the present Fair Trade Act meets the tests of constitutional validity and that as stated by Mr. Justice Miller at page 375, "by elimination of the 'non-signer' provision and substitution of the provision that permits the voluntary contractual restriction on minimum resale price to be agreed upon by the manufacturer or distributor and retailer, it has removed the chief ground and reason relied upon by courts that have held Fair Trade Acts to be unconstitutional."

The court further held that section 59-8.2(10) (Code, 1950, as amended) defining "contract" must be read with section 59-8.3 (Code, 1950, as amended), and that the notice is the offer to make a contract. At page 379 the court uses the following language:

> "Acceptance of the commodity for resale with notice attached stating its minimum retail price constitutes prima facie evidence of actual notice to the retailer of the imposed minimum resale price; acceptance with actual notice of the minimum resale price is deemed assent to the terms imposed in the notice. Voluntary acceptance of the commodity with actual notice of the imposed minimum retail price creates the contract."

In the latter case General Electric shipped its commodity bearing its trade-mark to Standard Drug at a time when the latter had in its possession a list of the fair trade minimum retail prices. In the instant case, the court is of the opinion that the evidence shows that the respondent had actual notice of the minimum retail prices of the complainant's commodity which constituted an offer. How-

ever, the respondent obtained the complainant's commodity from a source other than the complainant.

The court is of the further opinion that the receipt of the commodity from a source other than the manufacturer cannot be deemed an acceptance by the respondent, for the respondent was not a party to the agreement or in privity with either of the parties, and the Fair Trade Act is limited to voluntary agreements. To hold otherwise would be to write into the law that which has been removed from it, to-wit: the "non-signer" provision.

The court is, therefore, of the opinion that the relief prayed for should be denied.

A decree carrying out the foregoing and noting the exceptions of counsel for the complainant may be presented at the convenience of counsel.

Very truly yours,

/s/ Walter A. Page

Walter A. Page

Judge

WAP: meg

VIRGINIA:

IN THE COURT OF LAW AND CHANCERY
OF THE CITY OF NORFOLK

BULOVA WATCH COMPANY, INC.,
a New York Corporation,
Complainant,
vs.
ZALE-NORFOLK, INC.,
T/A ZALE'S JEWELERS,
a Virginia corporation,
Defendant.

DECREE.

This cause came on this day to be heard upon the Bill of Complaint filed by complainant, the defendant's answers to said Bill of Complaint and upon the evidence taken ore tenus, and was argued by counsel for both parties.

Upon consideration whereof, it appearing to the Court that the complainant manufactures watches, radios and other commodities which bear its trade name, the minimum prices of which commodities for resale is fixed by it; that the defendant has sold, and continues to sell, at retail, watches and other commodities manufactured by the complainant but not purchased by it from the complainant, at prices below the minimum prices fixed for resale by complainant; that there is no contract between the parties, expressed or implied, whereby the defendant agreed to sell at retail any of the commodities so manufactured by complainant at the prices fixed by the latter,

by reason whereof the defendant is not obligated to sell said commodities as manufactured by complainant at the minimum prices fixed by complainant for resale of such commodities.

The Court doth, therefore, ADJUDGE, ORDER and DECREE that the defendant is not obligated to complainant to sell any watches or other commodities manufactured by complainant at the minimum resale price fixed by complainant.

And the Court doth further ADJUDGE, ORDER and DECREE that the complainant is not entitled to the relief prayed for by it in the Bill of Complaint, and that the said Bill of Complaint be, and hereby is, dismissed, to which action of the Court the complainant excepts.

To the Clerk of the Court of Law and Chancery of the City of Norfolk, enter this Decree in vacation 9-7-1961.

WALTER A. PAGE,
Judge.

Certified copy of decree of Supreme Court of Virginia on the petition of Bulova Watch Company vs. Zale-Norfolk, Inc.

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Thursday the 1st day of March, 1962.

The petition of Bulova Watch Company, Inc., a New York corporation, for an appeal from a decree entered by the Court of Law and Chancery of the City of Norfolk on the 7th day of September, 1961, in a certain chancery cause then therein depending, wherein the said petitioner was plaintiff and Zale-Norfolk, Inc., t/a Zale's Jewelers, was defendant, having been maturely considered and a

transcript of the record of the decree aforesaid seen and inspected, the court being of opinion that the said decree is plainly right, doth reject said petition, and refuse said appeal, the effect of which is to affirm the decree of the said Court of Law and Chancery.

A Copy, Teste:

H. G. Turner,
Clerk.

Certification by Clerk of Court of Law and Chancery of the City of Norfolk.

State of Virginia,
City of Norfolk, To-Wit:

I, W. L. Prieur, Jr., Clerk of the Court of Law and Chancery of the said City of Norfolk, and State of Virginia, do hereby certify that the foregoing and annexed opinion of the Court, Decree and Mandate of the Supreme Court of Appeals of Virginia, are true and exact copies of the original taken from the Records of said Court, in the chancery cause of Bulova Watch Co., Inc. v. Zale-Norfolk, Inc. etc.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court, at my office, this 5th day of September A. D., 1962, in the 187th year of the Commonwealth of Virginia.

(Seal)

W. L. Prieur, Jr.,
Clerk.

State of Virginia,
City of Norfolk, To-Wit:

I, Walter A. Page, a Judge of the Court of Law and Chancery of the said City of Norfolk, in the State of Vir-

ginia, do certify that W. L. Prieur, Jr., who hath given the preceding certificate, is Clerk of the said Court, and that his said attestation is in due form.

Given under my hand, this 5th day of September, A. D., 1962.

WALTER A. PAGE,
Judge of the Court of Law and Chancery of the said City of Norfolk.

STATE OF VIRGINIA,
CITY OF NORFOLK, TO-WIT:

I, W. L. Prieur, Jr., Clerk of the said Court of the said City of Norfolk, and State of Virginia, do hereby certify that Hon. Walter A. Page whose genuine signature appears to the Certificate above, is a Judge of the said Court, and that all his official acts as such are entitled to full faith and credit.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court, at my office, this 5th day of September A. D., 1962, in the 187th year of the Commonwealth of Virginia.

W. L. PRIEUR, JR.,
Clerk.

(Seal)

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In the Supreme Court of the United States

No. 429.

OCTOBER TERM, 1963.

HUDSON DISTRIBUTORS, INC.,
Appellant,

vs.

THE UPJOHN COMPANY,
Appellee.

ON APPEAL FROM
THE SUPREME COURT OF THE STATE OF OHIO.

BRIEF OF APPELLANT.

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In the Supreme Court of the United States

No. 489.

OCTOBER TERM, 1963.

HUDSON DISTRIBUTORS, INC.,

Appellant,

vs.

THE UPJOHN COMPANY,

Appellee.

ON APPEAL FROM
THE SUPREME COURT OF THE STATE OF OHIO.

BRIEF OF APPELLANT.

OPINIONS BELOW.

The Opinion of the Trial Court in this case (R. 371-379), the Court of Common Pleas for Cuyahoga County, Ohio, is not officially reported. It is reported in 1960 Trade Cases, Paragraph 69,778.

The Opinion of the Court of Appeals for Cuyahoga County, including the dissent (R. 380-408), is reported in 117 Ohio App. 207 and at 176 N. E. (2d) 236.

The Opinion of the Supreme Court of Ohio, including the dissent (R. 413-424), is reported in 174 Ohio St. 487 and at 190 N. E. (2d) 460.

JURISDICTION.

This suit was brought on August 28, 1959 (R. 1), by Hudson Distributors, Inc. ("Hudson"), in the Court of Common Pleas of Cuyahoga County, Ohio, against the Upjohn Company ("Upjohn") under the Declaratory Judgment Statute of Ohio (Ohio Rev. Code, Secs. 2721.01-

2721.15) for a judgment declaring the 1959 Fair Trade Act to be null and void as violative of the Supremacy Clause (Article VI, Clause 2) of, and the Fourteenth Amendment to the Constitution of the United States, and repugnant to various provisions of the Constitution of the State of Ohio.

On July 28, 1960, the Court of Common Pleas of Cuyahoga County held that the Fair Trade Act of 1959 was unconstitutional under the Constitution of Ohio (R. 371). The federal constitutional grounds were not reached.

Following Upjohn's appeal on August 16, 1960 (R. 370), the Court of Appeals for Cuyahoga County by a vote of 2 to 1 reversed the Court of Common Pleas, and on September 27, 1961 sustained constitutionality (R. 411-412). The federal constitutional issues raised by Hudson were disposed of by reliance upon *Standard Drug Company, Inc. v. General Electric Company*, 202 Va. 367, 117 S. E. (2d) 289 (1960) *app. dismissed*, 368 U. S. 4 (1961). The Journal Entry of the Court of Appeals entered September 27, 1961

> "ordered that Sections 1333.27 through 1333.34 of the Ohio Revised Code be and the same hereby are declared to be valid, lawful, and enforceable enactments of the Ohio General Assembly and *not to be in violation of the Constitution of the State of Ohio or of the Constitution of the United States or of any law of the United States* * * *" (R. 412).

On September 29, 1961 (R. 412), Hudson appealed to the Supreme Court of Ohio. On May 8, 1963, the Ohio Supreme Court, without discussing the federal issues, affirmed the judgment of the Court of Appeals for Cuyahoga County by a vote of three Judges in favor of affirmance and four Judges against (R. 425).

Although a majority of the Judges held the statute to be unconstitutional, the Ohio Supreme Court could not so hold by reason of Article IV, Section 2 of the Ohio Constitution which requires that, except in affirmance of a judgment below, at least six members of the Supreme Court must be of the opinion that a State Statute is unconstitutional before the Court may so declare (R. 424). On May 22, 1963, Hudson filed its Petition for Rehearing in the Ohio Supreme Court, which was denied by the Court on June 12, 1963 (R. 425).

On August 1, 1963, Hudson filed in the Supreme Court of Ohio its Notice of Appeal to the Supreme Court of the United States (R. 426). The Jurisdictional Statement herein was filed on September 24, 1963 and this Court noted probable jurisdiction on December 9, 1963.

The Jurisdiction of the Supreme Court of the United States to review the decision by appeal from the judgment of the Supreme Court of the State of Ohio is conferred by Title 28, United States Code, Section 1257(2).

STATUTES INVOLVED.

The constitutional and statutory provisions involved are the Supremacy Clause (Article VI, Clause 2) of the Federal Constitution; the Due Process Clause of the Fourteenth Amendment to the Federal Constitution; the Miller-Tydings Amendment to the Sherman Act of July 2, 1890, 15 U. S. C. Sec. 1, 50 Stat. 693; the McGuire Act of 1952, 15 U. S. C. Sec. 45(a)(1)-(5), 66 Stat. 632; the Ohio Fair Trade Act of 1959, Ohio Rev. Code Secs. 1333.27 through 1333.34, 128 Ohio Laws 698. They are printed in Appendix A hereto.

QUESTIONS PRESENTED.

1. Whether the Ohio Fair Trade Act violates the Supremacy Clause of the Federal Constitution in that:

(a) The Act attempts to repeal Section 5(a)(5) of the McGuire Act and Section 1 of the Sherman Anti-Trust Act by authorizing the "proprietor" of a trademark or trade name to establish minimum resale prices for wholesalers with whom the "proprietor" is in competition;

(b) The Act attempts to repeal Section 5(a)(5) of the McGuire Act and Section 1 of the Sherman Anti-Trust Act by authorizing the "proprietor" of a trademark or trade name to compel its distributors to enter into "horizontal" (i.e. at the same level of distribution), price fixing agreements or unlawful boycotting arrangements with other distributors;

(c) The Act attempts to repeal Sections 5(a)(2), (3), (4) and (5) of the McGuire Act and Section 1 of the Sherman Anti-Trust Act by authorizing the "proprietor" of a trademark or trade name, who need not necessarily be the owner thereof, to establish minimum resale prices by notice to distributors without the consensual agreement intended by Congress.

2. Whether the Ohio Fair Trade Act is unconstitutional under the Due Process Clause of the Fourteenth Amendment to the Federal Constitution in that the Act confers upon the "proprietor" of a trademark or trade name a "proprietary interest" in a commodity despite the sale of and receipt of the full price for such commodity with the trademark or trade name affixed thereon, and by reason of such "proprietary interest," empowers the "proprietor" to compel a remote non-consenting vendee to adhere to a minimum resale price.

3. Whether the federally unconstitutional provisions of the Ohio Fair Trade Act are so commingled and entwined with the remainder of the Act and so inseparable therefrom as to make the entire Act unconstitutional under the Federal Constitution.

STATEMENT OF THE CASE.

A. INTRODUCTION: THE NEW OHIO FAIR TRADE LAW.

On January 23, 1958, the Supreme Court of Ohio nullified the nonsigner clause of the Ohio Fair Trade Act of 1936 (O. R. C., Sec. 1333.07), in *Union Carbide and Carbon Corp. v. Bargain Fair, Inc.*, 167 Ohio St. 182, 147 N. E. (2d), 481. The Court held that the nonsigner provision constituted an unauthorized exercise of the police power, contravened the "due process" provision of the Ohio Bill of Rights by denying the nonsigner the privilege of disposing of his own property on terms of his own choosing, and delegated legislative power to private persons.

On June 29, 1959, the Ohio Legislature enacted a new Fair Trade Law (O. R. C., Secs. 1333.27-1333.34). The purpose of the new statute was to overcome the ruling in *Bargain Fair*. As the exposition of the statute was put in the Ohio House Judiciary Committee (R. 210):

> "The Supreme Court, in the Union Carbide case, recognized that if there had been a contract, it would be enforceable. *There will now be a contract arising by the act of the parties, or imposed by statute.*" (Italics added.)

The constitutional infirmity, then, was to be overcome by making "contractors" of all persons who would otherwise be "nonsigners." Gorrell and Brown, *A Re-Examination of Fair Trade Legislation in the Context of the New Ohio*

Fair Trade Act and the Decision in Hudson Distribs., Inc. v. Upjohn Co., (1963) 15 Western Res. L. Rev. 84, 91, 94.

The new statute (Appendix A, at pp. 88 to 95), contains "new concepts" (R. 415).

1. "Proprietor" and "Proprietary Interest."

A "proprietor" (Section 1333.28(K)(1)) is defined to include a person who "identifies a commodity" produced by him "by the use of his trade-mark or trade name." The proprietor is vested with a "proprietary interest" in the identified commodity after he has sold it to distributors. Section 1333.31 provides:

> "A proprietor *shall retain* a proprietary interest in any commodity with respect to which he is a proprietor after he has sold it to distributors, so long as such commodity continues to be identified by his trade-mark or trade name, by reason of his interest in stimulating demand for such commodity through effective distribution to ultimate consumers and of his interest in continuing protection of the good will associated with his trade-mark or trade name." (Italics added.)

2. "Contract."

Section 1333.28(I) [1] defines "contract" to mean "any agreement, written or verbal, *or arising from the acts of parties.*"

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[1] "'Contract' means any agreement, written or verbal, or arising from the acts of the parties. The establishment by a proprietor of a minimum resale price for any commodity pursuant to the provisions of section 1333.29 of the Revised Code and the proprietor's permission for a distributor to acquire and use the proprietor's interest in the trade-mark or trade name in reselling the commodity shall constitute a contract and sufficient consideration from the proprietor for a promise by the distributor not to sell such commodity at less than the minimum price estab-

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3. Consideration.

Section 1333.28(I) further defines "a contract and sufficient consideration" for the resale price undertaking. Such contract and consideration consist of the establishment by the proprietor of a minimum resale price for the commodity and the "proprietor's permission" for the distributor to acquire and use the proprietor's interest in the trade-mark or trade name in reselling the commodity.

4. Source of Acquisition as Immaterial to Resale Price Agreement.

Section 1333.28 (I) also creates an agreement between the proprietor and distributor who, with notice of the establishment of a minimum resale price, acquires the commodity directly from the proprietor *or otherwise*.[2]

5. "Notice."

Notice is defined by Section 1333.28(J) as

> "actual notice given by any method provided in section 1333.30 of the Revised Code, or otherwise established by legally admissible evidence."

(Continued from preceding page)

lished by the proprietor. Any distributor (whether he acquires such commodity directly from the proprietor or otherwise) who, with notice that the proprietor has established a minimum resale price for a commodity, accepts such commodity shall thereby have entered into an agreement with such proprietor not to resell such commodity at less than the minimum price stipulated therefor by such proprietor."

[2] The last sentence of the Section provides:

> "Any distributor (*whether he acquires such commodity directly from the proprietor or otherwise*) who, with notice that the proprietor has established a minimum resale price for a commodity, accepts such commodity *shall thereby have entered* into an agreement with such proprietor not to resell such commodity at less than the minimum price stipulated therefor by such proprietor." (Italics added.)

Section 1333.30 provides numerous methods for conveying to a distributor notice of the establishment of minimum resale prices, which, following the "acceptance" of a commodity, will create a "contract" pursuant to Section 1333.28(I).[3]

"Conclusive evidence of actual notice" of minimum resale prices is also provided for by Section 1333.30. The third sentence of this section states:

> "The acquisition of or dealing in *merchandise clearly marked,* or enclosed in *containers, packages or dispensers clearly marked,* or the *invoice* for which was clearly marked, with minimum resale prices established by a proprietor shall be conclusive evidence of actual notice of such minimum resale prices." (Italics added.)

Section 1333.30 also provides that a person with actual notice of any applicable minimum resale price is also charged with notice that such a price is subject to change.

6. Establishment of Minimum Resale Price by Contracts *or* Notice; and Differentiation at Different Levels of Distribution.

Section 1333.29 contains three Subparagraphs. The first sentence of Subparagraph (A) sets forth two alternative methods "to establish and control" resale prices, by notice to distributors *or* by contract:

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[3] Section 1333.30 provides that actual notice of a stipulated minimum resale price for a commodity may be given to any person (a) by mail, (b) through advertising, (c) through notice attached to merchandise, to containers, packages, or dispensers thereof, (d) on the invoice therefor, or (e) imparted orally.

The deposit in the mails, postage prepaid, of a letter to a distributor specifying minimum resale prices shall constitute prima facie evidence of actual notice to such distributor.

"It shall be lawful, anything in sections 1331.01 to 1331.14 of the Revised Code or otherwise provided in the Revised Code to the contrary notwithstanding, for a proprietor *to establish and control by notice to distributors or by contract*, stipulated minimum resale prices for a commodity of which he is the proprietor and which is in free and open competition with commodities of the same general class produced by others and offered for sale in the same general market area."

Subparagraph (A) further provides for minimum resale price differentiation at various levels of distribution and for the change of such prices.[4]

7. **Wholesale and Retail Resale Price Maintenance.**

Resale price maintenance at the wholesale level is also authorized *although the proprietor sells to retailers in competition with his wholesale distributors.* The last sentence of Section 1333.29(A) provides:

"A proprietor may so establish such minimum resale prices for his wholesale distributors, notwithstanding section 1333.34 of the Revised Code, *even though he sells such commodity to retailers in competition with such wholesale distributors,* if such sales to retailers are made at prices not less than those he establishes for such wholesale distributors for comparable sales." (Italics added.)

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[4] The second and third sentences of Section 1333.29(A) provide:

"Such minimum resale prices may be differentiated as to various levels of distribution, provided such differentiations are not otherwise unlawfully discriminatory. Such prices may be changed from time to time by written notice to distributors who acquired such commodity with notice of any established minimum resale price."

8. Limitations Upon Channels of Distribution and Marketing Practices by Seller, Distributors and Subvendees.

Subparagraph (B) of Section 1333.29 authorizes the resale price notice or the resale price contract to contain various provisions limiting the buyer's channels of distribution, and imposing limitations and requirements upon both buyer and seller with respect to the resale of the commodity, and the imposition of marketing restrictions upon subvendees.[5]

9. Third Party Beneficiary Provisions.

Section 1333.29(C) provides:

"(C) Any contract or notice authorized by and entered into pursuant to any of the provisions of sections 1333.27 to 1333.34, inclusive, of the Revised Code, shall be for the benefit of the proprietor and any distributor who is bound by a similar contract or notice."

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[5] "(B) Any such contract or notice may contain the following provisions:

(1) That the buyer will not resell such commodity at less than the minimum resale price stipulated by the proprietor thereof for the level of distribution at which the buyer resells the same;

(2) That the buyer will require from any distributor to whom he may resell such commodity an agreement that such distributor will not, in turn, resell such commodity at less than the minimum resale price stipulated by the proprietor thereof for the level of distribution at which such distributor resells and that such distributor, if he resells to another distributor, will make the same agreement with the distributor to whom he may sell;

(3) That the seller will require from any other distributor to whom he may sell other items of such commodity an agreement that such distributor will not, in turn, resell such commodity at less than the minimum resale price stipulated by the proprietor for the level of distribution at which such distributor resells and that such distributor, if he resells to another distributor, will make the same agreement with the distributor to whom he may resell."

10. Defenses: Removal of Trade-Marks.

Section 1333.33 sets forth various defenses to an alleged violation of Section 1333.32 by a sale below the stipulated minimum resale price. Section 1333.33(D) provides such a defense:

> "(D) After the distributor has removed from such commodity *all trace of the proprietor's identifying trade-mark or trade name* and that in such sale or offer to sell or advertisement for sale no statement, representation, or suggestion of any kind is made which would identify such commodity with the trade-mark or trade name of the proprietor." (Italics added.)

Other defenses include the closing out of the distributor's stock of the commodity, the advertisement and sale of second hand or damaged merchandise, and sales by an officer acting under an order of court.

11. Horizontal Price Fixing.

Section 1333.34 prohibits horizontal price fixing "except as otherwise specifically provided in Section 1333.29." Section 1333.34 provides:

> "Sections 1333.27 to 1333.34, inclusive, of the Revised Code, shall not, *except as otherwise specifically provided in section* 1333.29 *of the Revised Code,* apply to any contract, agreement, or understanding between or among producers, or between or among distributors, or between or among wholesalers." (Italics added.)

12. Actions.

By Section 1333.32 (A), sale below the stipulated resale price is made "unlawful and an act of unfair competition," and actions to enforce the statute are authorized. Section 1333.32 is binding upon "any distributor *with*

notice that a proprietor has established a stipulated minimum resale price for a commodity of which he is the proprietor *or* * * * any distributor who is *in contract with* a proprietor."

13. Purpose.

The statute contains, in Section 1333.27, three paragraphs devoted to the purpose of the enactment.[6] Section 1333.27(A) recites that the statute is enacted "in the exercise of the police power of the state" as well as pursuant to the constitutional authority of the General Asssembly to regulate the sale and conveyance of personal property.

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[6] "Sec. 1333.27. (A) Sections 1333.27 to 1333.34, inclusive, of the Revised Code are enacted in the exercise of the police powers of the state and in pursuance of the power specifically granted the general assembly by the people in Section 2 of Article XIII, Ohio Constitution, to regulate the sale and conveyance of personal property, and the purposes of sections 1333.27 to 1333.34, inclusive, of the Revised Code, are generally to protect and preserve small business, to safeguard the good will of trade-marks and trade names, to further wholesome competition, to prevent monopoly in the distribution of goods, and to promote the public welfare by securing wider distribution of commodities and an increase in the production thereof, and thereby reducing production and distribution costs, protecting and increasing gainful employment in manufacturing, wholesaling and retailing, all for the benefit of the consumer and the well-being of the citizens of the state.

"(B) It is the further purpose of sections 1333.27 to 1333.34, inclusive, of the Revised Code, to promote the distribution in commerce in the state of identified merchandise which is in free and open competition with other articles of the same general class. Where fair, equitable, and competitive prices cannot be maintained in all appropriate stages in the distribution of such identified merchandise, the marketing of such merchandise is depressed and the quantity thereof moving in the channels of commerce in the state declines.

"(C) To remove obstructions to the marketing of identified merchandise in commerce which are occasioned by unfair selling

(Continued on following page)

Section 1333.27(B) also states as a purpose, the maintenance of "fair, equitable and competitive prices * * * in all appropriate stages in the distribution of * * * identified merchandise * * *."[7]

The new Fair Trade Act became effective on October 22, 1959 after having been passed over the veto of Governor DiSalle. (Amended Petition, R. 5.)

B. ESTABLISHMENT OF HUDSON, METHOD OF OPERATION, AND ACQUISITION OF UPJOHN PRODUCTS IN THE COURSE OF COMMERCE.

In 1958, Appellant ("Hudson") opened a retail drug and cosmetic store in downtown Cleveland (Rudolph, R. 156).

Hudson does not purchase any Upjohn products from Appellee (Shulman, R. 51). Hudson buys Upjohn products from a Michigan warehousing corporation engaged in the sale of drugs and cosmetics to Hudson and other companies which are retailing affiliates of Hudson (Shulman, R. 51).

Hudson purchases such products from the Michigan warehousing corporation in anticipation of the resale of such commodities to the consuming public (Shulman, R.

(Continued from preceding page)

practices, it is the policy of the state to afford distributors of identified merchandise an effective means whereby the sale of such merchandise at all appropriate stages of distribution may be consummated at prices adequate to stimulate distribution and low enough to enable distributors of such identified merchandise to compete effectively with those marketing other goods, who by size and dominance may distribute such goods through their own retail outlets or by franchise or consignment methods, and to satisfy the needs of ultimate consumers."

[7] It states in part:

"Where fair, equitable, and competitive prices cannot be maintained in all appropriate stages in the distribution of such identified merchandise, the marketing of such merchandise is depressed and the quantity thereof moving in the channels of commerce in the state declines."

51). The purchases are made at weekly intervals; and the warehousing company regularly ships Upjohn products from the State of Michigan to the State of Ohio for resale by Hudson (Shulman, R. 51).

It has been the policy of Hudson to sell goods at a price which brings it a reasonable profit. Hudson does not engage in "loss leader merchandising" or "bait advertising" (Shulman, R. 51). Hudson's method of doing business permits it to make a profit while selling products at prices lower than those set by Upjohn and by other manufacturers of drugs and cosmetics (Shulman, R. 51).

C. INCEPTION OF LITIGATION; STIPULATIONS OF ISSUES AND EVIDENCE.

Upjohn notified Hudson that its products would be on fair trade on October 22, 1959, the effective date of the statute (Exhibit 2 to Answer and Cross-Petition, R. 27); and that it had signed new Fair Trade contracts which would also become effective on that date. On August 28, 1959, Hudson filed a declaratory judgment action to test the constitutionality of the new fair trade act (R. 1). Following the effective date of the statute, Hudson filed an Amended Petition on October 28, 1959 (R. 5). Upon the filing of a Motion to Strike by Upjohn, Hudson filed a Second Amended Petition on January 11, 1960 (R. 8).

Upjohn thereupon filed its Answer denying Hudson's allegations that the 1959 Fair Trade Law was unconstitutional, and a cross-petition praying for temporary and permanent injunctive relief, damages in the amount of Nine Thousand Five Hundred Dollars ($9,500.00), costs and attorneys' fees (R. 14).

Upjohn's answer alleged that it had entered into formal written contracts with retailers in Ohio and had

notified Hudson of the establishment of minimum prices; (R. 15) "and that the condition and consideration for plaintiff to acquire and use defendant's interest in such trade-marks was the agreement and promise by plaintiff not to resell such commodities at less than such established minimum resale prices therefor." A copy of a "Retailer Fair Trade Agreement" was attached as an exhibit to its cross-petition (R. 25).

Hudson filed a reply to Upjohn's answer and an answer to the cross-petition in which it denied all allegations of injury to Upjohn, and also asserted affirmative defenses to the cross-petition, including defenses derived from the McGuire Act (R. 27-30).

In its pleadings in the trial court, in its briefs and in its Petition for Rehearing in the Court of Appeals (R. 409), Hudson attacked the Act as repugnant to various provisions of the Ohio Constitution, and as violative of the Supremacy Clause and the Due Process Clause of the Fourteenth Amendment to the Federal Constitution. These respective federal and state grounds were briefed and argued by Hudson in the trial court and in the appellate courts.

On April 20, 1960, the parties by agreement in open court limited the issues before the Trial Court to the question of the constitutionality of the 1959 Fair Trade Law, i.e., on the issues in Hudson's second amended petition, Upjohn's answer and the reply thereto. The issues upon Upjohn's cross-petition for affirmative relief and Hudson's pleadings thereto were reserved.

By further stipulation of the parties, the evidence in the case was specified to be the affidavits and the respective exhibits thereto filed by the parties, and the deposition of Vern L. Smith, Sales Manager of the Cleveland Branch of

Upjohn. Both parties waived cross-examination as to such witnesses and all objections as to the competency of the matters stated in the affidavits and the respective exhibits thereto. The parties reserved all objections to the materiality or relevancy of the evidence (R. 30).

D. THE RECORD DISCLOSES (i) UPJOHN'S METHOD OF SETTING WHOLESALE AND RETAIL FAIR TRADE PRICES, AND (ii) UPJOHN'S WHOLESALE DISTRIBUTION DIRECTLY AND THROUGH OTHERS, INCLUDING ITS COMPETITOR, McKESSON AND ROBBINS, INC. ("McKESSON").

(i) **Upjohn set fair trade prices by two methods.** It gave notice that Upjohn products would be on Fair Trade on October 22, 1959 at the prices appearing in its catalog. Upjohn also entered into Fair Trade Contracts effective on October 22, 1959 (Exhibit 2 to Answer and Cross-Petition, R. 27).

The Upjohn Fair Trade Agreement designates Upjohn as the "proprietor" who "retains an interest" in the good will for its products "so long as commodities bearing its trade-marks, brands or names are offered for sale in commerce." By the contract, the signing retailer is permitted to "enjoy the benefit of the good will" by "referring to said trade-marks, brands or names in the promotion of sales of said commodities by Retailer." (Exhibit 1 to Answer and Cross Petition, R. 25.)

The minimum retail prices under this contract are "those designated in Proprietor's catalog on October 22, 1959." The right to change the catalog is reserved by Proprietor.

This contract is obviously drawn with reference to the "proprietary interest" provisions of the new Ohio Fair Trade Law (O. R. C., Sec. 1333.28(I)).

(ii) **Upjohn manufactures and sells pharmaceuticals and other commodities in commerce in Ohio and throughout the United States.** (Smith, Affidavit, R. 97-98.)

The Deposition of Vern L. Smith, Sales Manager of Upjohn's Cleveland Branch, (R. 86-96), discloses that Upjohn maintains a warehouse and sales office in Cleveland (the "Cleveland Branch"). This Cleveland Branch employs 79 sales representatives who take orders for Upjohn products in various sections of Ohio, Pennsylvania, and New York from retail druggists, hospitals and veterinarians. These orders are processed and shipped from the Cleveland Branch (R. 86-87).

(iii) **McKesson is a manufacturer and a competing wholesaler of Upjohn products.**

McKesson is a manufacturer of proprietary drugs (Nolen, President, McKesson and Robbins, R. 184). It is also one of Upjohn's wholesalers in the area served by the Cleveland Branch (R. 88-89). The McKesson salesmen and the salesmen of Upjohn's Cleveland Branch call on the same pharmacies for orders, and seek to do business with the individual retail pharmacy (R. 89).

Orders taken by McKesson for Upjohn products are sent to the Cleveland Branch where the order is processed and the goods shipped from Upjohn's Cleveland Branch to the Cleveland warehouse of McKesson (R. 89).

Upjohn has issued separate wholesale (R. 433-464) and retail (R. 465-497) price catalogs, each of which sets forth a "Minimum Resale" price. The "Minimum Resale" prices are the fair trade prices under the Upjohn Retailer Fair Trade Agreement (R. 470).

The Retail Edition of the Catalog presents for each commodity a "List Price" and "Minimum Resale" price. On direct sales by Upjohn to the retailer, the retailer pays

a discount of 40 per cent from the "List Price" shown in the retail catalog (R. 466). This discount amounts to approximately one-third off the "Minimum Resale" price—the fair trade price—which appears alongside the "List Price" in the retail catalog.

The Wholesale Edition of the catalog sets forth for each commodity a "Price to Retailer" and the "Minimum Resale" price (e.g. R. 458). McKesson wholesales at a higher price to the retailer than does Upjohn. On Kaopectate, for example, the retailer would pay approximately 15 per cent more to McKesson than to Upjohn (R. 90). McKesson observes Upjohn's wholesale catalog prices (R. 95). Mr. Smith felt that the Upjohn Company regarded the wholesale prices as "in effect in the fair trade State of Ohio" (R. 96).

Retail druggists are willing to pay a higher price for Upjohn products to McKesson because of its very convenient delivery system (Block, R. 72).

By affidavit filed subsequent to his deposition, Mr. Vern L. Smith set forth a *del credere* "Agency Agreement" between Upjohn and its wholesalers which retains in Upjohn the ownership of Upjohn products in the hands of such wholesalers (R. 105-109). This Agency Agreement also requires the agent to remit monthly to Upjohn, at the "Price to the Retailer," for all goods shipped to agent during the preceding month, less a commission of 15 per cent (R. 106). Agent agrees to sell all consigned goods at the "Price to Retailer" in the current Wholesale Edition of the Upjohn catalog (R. 107).

McKesson invoices (Exhibits A through K to Block Affidavit, facing R. 74) give no indication that McKesson is an agent for any manufacturer rather than the owner of the products which it wholesales, whether such products are Upjohn's or McKesson's (R. 70).

E. UPJOHN'S EVIDENCE CONCERNED THE ECONOMIC JUSTIFICATION FOR THE NEW FAIR TRADE LAW AND INJURY TO ITS BUSINESS AND GOOD WILL.

Upjohn argued from the facts of record that the enactment in Ohio of the fair trade legislation was economically necessary.

Appellee presented the Legislative Hearings before the Judiciary Committees of the House of Representatives and Senate of the Ohio Legislature (R. 193-338). Various propositions of economics, Appellee argued in its briefs, were substantiated by this legislative history; and these propositions were reflected in the purpose clauses appearing in Section 1333.27, Paragraphs (A), (B), and (C) (*supra*, note 6).

Upjohn contended that the facts of record presented by it, demonstrated the validity of the economic data presented to the Ohio Legislature and justified the findings which the Legislature made from the economic evidence before it.

Upjohn further contended that Hudson emphasizes the sale of vitamin products and has capitalized upon Upjohn's UNICAP and ZYMACAP vitamins (Smith Affidavit, R. 104). On the basis of affidavits of various proprietor-pharmacists,[8] Upjohn argued that although Hudson employs pharmacists, Hudson does not render the services of a normal drugstore (R. 152, 154, 157), such as delivery service, full prescription service, twenty-four hour service, etc., which a drugstore must be ready to provide in order to meet the medical needs of its community.

Extensive reliance was placed by Upjohn upon the affidavit of William J. Crable, a Pinkerton operative (R.

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[8] Avellone (R. 137-139); Cermak (R. 139-141); Gross (R. 150-153); Bruehler (R. 153-155); Rudolph (R. 156-158).

148-149). Crable was given three prescriptions to be filled, each of which required compounding. Upon Hudson's declining to fill these prescriptions with the notation "Do not have," Mr. Crable had them filled at downtown and suburban drug chain outlets and by neighborhood pharmacists (R. 149). The affidavits of several pharmacists stated that the prescriptions were not unusual (R. 152, 155, 157-158).

No store other than Hudson's at which Crable presented the prescriptions failed to fill them.

Pharmacists' affidavits also stated that Hudson is "skimming the cream" off the retail drug business in the City of Cleveland (R. 154, 157); and Hudson has taken the over-the-counter sale of pharmaceuticals which have been most widely promoted and are in greatest demand and is selling them at cut prices to attract customers into its stores (e.g., R. 150). This is especially the case with Upjohn's UNICAP and ZYMACAP vitamins (Affidavit of Branch Manager Smith, R. 104).

From the foregoing, Upjohn contended that although Hudson poses as a pharmacy, it does not render full pharmaceutical services and fills only the prescriptions which can be handled easily and do not require compounding; and Hudson is exploiting the good will of Upjohn to its own advantage and to the detriment of Upjohn and its legitimate drugstore customers.

Upjohn also contended that its good will had been injured by Hudson. The Affidavit of the Cleveland Branch Manager states that the effect of Hudson's policies appears in the decline in sales of UNICAP and ZYMACAP vitamins for the first three months of each of the years 1958, 1959 and 1960 (R. 103). The affidavits of five pharmacists are also relied upon to demonstrate the slump

in over-the-counter sales of Upjohn drugs and vitamins. The affidavit of Pharmacist Rudolph further states that by reason of Hudson's price cutting, he was abused by his customers, with one of them referring to his vitamin prices and calling him a "Jesse James" (R. 158).

Upjohn argued that the facts in the affidavits of the pharmacists which the Legislature of Ohio took into account, also find support in economic theory, as shown by the affidavit of Professor William R. Davidson of Ohio State University (R. 109). Such evidence is further supported by various industry leaders, as shown in the affidavits of John W. Hubbell, Vice President of the Simmons Company (R. 118-122); Benton F. Kauffman, Vice President of The Kauffman-Lattimer Company, a Columbus, Ohio, drug wholesaler (R. 122-126); Donald E. Noble, President of Rubbermaid Inc. (R. 126-128); Herman T. Van Mell, General Counsel of Sunbeam Corporation (R. 128-134); and Lee Waterman, Vice President of Corning Glass Works in charge of its Consumer Products Division (R. 134-137).

Upjohn also presented in support of the economic necessity for fair trade the affidavits of three hardware retailers (R. 145-146; 146-148; 159-161) and a retail camera dealer (R. 141-144).

F. HUDSON DENIED ANY ECONOMIC JUSTIFICATION FOR THE FAIR TRADE LAW OR ANY INJURY TO UPJOHN.

Hudson contended that there was no economic necessity for the passage of the Fair Trade Law and denied that the record showed any injury to Upjohn.

Hudson presented the affidavits of two Ohio economists, Dr. S. Sterling McMillan, the Chairman of the

Department of Economics of Western Reserve University (R. 31-38), and of Robert Bartels, Professor of Business Organization of Ohio State University (R. 39-50).

The affidavit of Bernard Shulman, the President of Hudson (R. 50-52), noted the increase in national sales of Upjohn in the years 1957 through 1959, although fair trade statutes were not enforced against nonsigners in 19 states and in the District of Columbia. As a result of the merchandising policies of Hudson, an expanding market has been created for the products of Upjohn and other drug manufacturers among people who could not otherwise afford them (R. 51-52).

Neither monopoly nor price war has resulted in the Cleveland area from Hudson's entry into business, nor has Hudson made any attempt to monopolize or institute a price war (R. 52). The sales volume of the Cleveland Branch of Upjohn, the number of customers, and Upjohn's reputation for excellence have steadily increased in each of the years 1957, 1958, and 1959. No drug store or retail outlet in the City of Cleveland has discontinued the sale of Upjohn products in each of these years (Smith Deposition, R. 91-94).

The affidavit of Pharmacist Johns, a pharmacist of 35 years standing and an employee of Hudson, indicated that two pharmacists in the employ of Appellant fill over a thousand prescriptions per week (R. 54). The prescriptions presented by Pinkerton operative Crable, calling for a capsule of powdered charcoal, are seen in not more than 1 in 5,000 prescriptions (R. 55). The pressure of Hudson business usually does not permit the two pharmacists "leeway" time, to handle prescriptions of the kind presented by Investigator Crable (R. 55).

Moreover, affiant had never seen, prior to her employ-

ment at Hudson's, prescription service of the highest quality made available to the public at so reasonable a price (R. 54).

Other economic data was presented concerning the lack of any correlation between business failures and the fair trade laws, the rising income of retail drug stores, the sales and profit increases of drug and cosmetic manufacturers, the increasing volume of vitamin sales, and the impact of fair trade in increasing prices to the consumer by increasing profits for pharmacists (R. 60-69).

G. RULING BY THE SUPREME COURT OF OHIO.

The Opinion in the Supreme Court of Ohio by the minority of three of seven Judges did not discuss the permissible scope of either state fair trade legislation or fair trade contracts under the federal enabling legislation. The Opinion was concerned solely with the validity of the new Fair Trade Act under the laws of Ohio.

The Opinion referred to "the implied contract doctrine" of Section 1333.28(I) as "the heart of the new act." The Opinion characterized the law as "regulating the sale and conveyance of personal property" pursuant to Section 2, Article XIII of the Ohio Constitution. The Opinion also noted that the new act was "much more comprehensive" than the prior law and "introduces into the law two entirely new concepts." (R. 415.)

(i) The first of the new concepts is *the retention by the proprietor of a proprietary interest following the sale* of the commodity to distributors (Section 1333.31). The Opinion noted that the General Assembly has extended the original concept of the trade-mark to include as part of the ownership of the mark, a continuing proprietary interest in the trade-mark or trade name on the merchan-

dise "to the extent that the proprietor can control the resale prices of the merchandise even after it has left his possession or ownership." (R. 416.)

The Opinion held that the General Assembly determined that such "extension of proprietary rights" was necessary not only to protect the property rights in the ownership of a trade-mark or trade name, but also to protect the small businessman and the public in general. In the absence of conclusive evidence to the contrary, the legislative determination would stand. (R. 417.)

(ii) The second of the new concepts is set forth in Section 1333.28(I) defining "*contract.*" The Opinion quoted the entire definition, including the second sentence referring to the establishment of a minimum resale price and "the proprietor's permission for a distributor to acquire and use the proprietor's interest in the trademark" in reselling the commodity as constituting "a contract and sufficient consideration" for the resale price maintenance undertaking by the distributor. (R. 417.)

The Opinion held this provision to be "the core of the act" and interpreted the Section as providing

> "in essence that, when a retailer with notice that an item has been fair-traded procures it for resale, he is deemed to have entered into an implied contract with the owner of the trademark that he will sell the item at the fair-trade price.
>
> There is no question that express price maintenance contracts are valid. *Garst v. Harris*, 177 Mass., 72; *Grogan v. Chaffee*, 156 Cal., 611." (R. 417.)

The Court went on to state:

> "The statute creates an implied contract by act of the parties. The doctrine of implied contracts is almost as old as the law of contracts. *The simple illustration of the appellees that, where one takes a candy bar from a grocer's shelf and eats it, he obligates*

himself to pay for it is a basic example of an implied contract by act. No word need be said; conduct creates the contract." (R. 418). (Italics added.)

(iii) The Opinion further noted that there was no compulsion on a retailer to handle the trade-marked goods, and cited and relied upon the Opinion of this Court in *Old Dearborn Distributing Co. v. Seagram-Distillers Corp.*, 299 U. S. 183, 193, 194 (1936). If the retailer selects the fair trade goods, he must abide by the conditions imposed thereon by the proprietor.

The Court noted the analogy to the purchase of a home where

> "there are in most instances, restrictive covenants as to use. We may not like such conditions, but if we accept the contract we must abide thereby. Liking or not liking the conditions of acquiring property has no effect on the validity of the contract." (R. 418.)

(iv) With reference to goods coming into Ohio from out of state, the Court stated that:

> "Once trademarked goods come into Ohio the law imposes certain conditions thereon, and they are held subject to those conditions." (R. 419.)

The Court also stated:

> "Under the Ohio law, the owner of the trademark, once the goods enter into Ohio, has by statute sufficient interest to control the resale price of the goods." (R. 419.)

(v) The Opinion also considered whether the "conditions and controls" set forth in the recitals of legislative purposes in Section 1333.27 are "within the police power as declared by the General Assembly." The Opinion found such basis in the preservation of small independent merchants.

The Opinion also found that the owners of trademarks have discovered that "discount selling of their products eventually cheapens them in the eyes of the public with the ultimate effect of injuring the value of the trademark or trade name and reducing their total sales." It was therefore concluded:

> "When the general welfare of the small merchant is considered together with the necessity of protecting the goodwill and value attached to a trademark, it was clearly within the legislative power to enact such protective legislation, and the court will not substitute its judgment in this instance for that of the General Assembly." (R. 422.)

The Opinion also held that there was no unconstitutional delegation of legislative power as to price fixing, or violation of the constitutional right of one to sell his own property on his own terms. Since "the implied contracts herein are valid, the retailer takes the goods on the conditions of the offer and thus voluntarily agrees to comply with the fair-trade price."

The Opinion accordingly held:

> "It is the intention of the new act to declare and protect the proprietary interest of a manufacturer in his trademark and the goodwill attached to it. * * * The means employed by the act is the long and well established legal doctrine of implied contract. None of the constitutional attacks on this new act have merit." (R. 423-424.)

The majority of the Judges of the Ohio Supreme Court dissented since the new Fair Trade Act attempts arbitrarily to bind nonsigners of price-fixing contracts and undertakes to control the price of seller's trade-marked merchandise by purchasers "who bear no relationship whatsoever to the producers of such merchandise." (R. 424.)

The controlling, though minority, Opinion of the Supreme Court never adverted to any issues concerning federal-state relationships in price fixing by private persons in interstate commerce.

H. THE MINORITY OPINION OF THE OHIO SUPREME COURT DOES NOT SETTLE THE LAW IN THE STATE, AND CONTRARY DECISIONS REMAIN IN FULL FORCE AND EFFECT IN THE SECOND AND THIRD MOST POPULOUS COUNTIES OF OHIO.

By reason of the Opinion by a minority of the Judges in the Supreme Court of Ohio, the law in the State remains in doubt. The constitutionality of the fair trade law remains open for decision by the various Courts of Appeals in Ohio.[9]

The decision in the case at bar in the Court of Appeals for the Cleveland area could not be reversed by the majority of the Judges of the Ohio Supreme Court. In other Ohio counties final judgments have been entered holding the entire Fair Trade Act to be unconstitutional. *Helena Rubinstein v. Cinci Vitamin & Cosmetic Distributors, Inc.*, 84 Ohio L. Abs. 143, 167 N. E. 2d 687 (Common Pleas, Hamilton County [Cincinnati], 1960) and *Bulova Watch Co., Inc. v. Ontario Stores of Columbus, Inc.*, 86 Ohio L. Abs. 585, 176 N. E. 2d 527 (Common Pleas, Franklin County [Columbus], 1961) affirmed without opinion by the Court of Appeals for Franklin County on June 19, 1962.

On the ground of the unconstitutionality of the statute, the Franklin County Court of Appeals in nine companion appeals, affirmed judgments of the Court of Common Pleas below which had sustained demurrers to

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[9] Pogue, *Hudson Fair Trade Case—The Need for Constitutional Amendment* (1963), 12 Clev-Mar. L. Rev., 513.

and dismissed fair trade petitions filed by various drug and cosmetic manufacturers. *Mead Johnson & Co, v. Columbus Vitamin & Cosmetic Distributors, Inc.*, 1962 Trade Cases, Par. 70,360.

In the *Bulova Watch* case, the Court of Common Pleas of Franklin County held the statute to be repugnant to the Miller-Tydings Act and the McGuire Act, hence unconstitutional under the Supremacy Clause of the United States Constitution. The Court of Appeals for Franklin County affirmed. Both the *Helena Rubinstein* and *Bulova Watch* decisions remain in full force and effect, in the second and third most populous counties in Ohio.

Only two propositions remain clear in the fair trade law of Ohio:

(1) A non-signer clause in a fair trade law is unconstitutional. *Union Carbide & Carbon Corp. v. Bargain Fair Inc.*, 167 Ohio St. 182, 147 N. E. 2d, 481 (1958).

(2) Hudson, which would be a "non-signer" under the prior 1936 law is by the 1959 law, "transformed" into a "contractor."[10] There are no longer "signers" or "non-signers" under the law of Ohio.

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[10] "Anyone who purchases goods with knowledge of the established resale price enters into a contract with the proprietor not to sell the goods for less than the established prices while using the proprietor's trademark. Therefore, by the employment of the elementary principles of offer and acceptance, the legislature has provided that a retailer enters into a contract with a proprietor when he purchases goods bearing the proprietor's trademark with knowledge that the proprietor has established resale prices for his goods. The proprietor thus establishes minimum resale prices as a condition for the use of his good will as an aid in the resale."

Gorrell and Brown, *A Re-Examination of Fair Trade Legislation in the Context of the New Ohio Fair Trade Act and the Decision in Hudson Distributors, Inc. v. Upjohn Co.*, 15 West. Res. L. Rev., 84, at 91.

SUMMARY OF ARGUMENT.

The nonsigner clause of the 1936 Ohio Fair Trade Law was held to be unconstitutional by the Supreme Court of Ohio in January, 1958, in *Union Carbide & Carbon Corp. v. Bargain Fair, Inc.*, 167 Ohio St. 182, at 186. The formulation of the 1959 Ohio Fair Trade Law (O. R. C., Sec. 1333.27 to Section 1333.34) was undertaken with a view to making all persons handling "fair-traded" merchandise "parties to the stipulated-price contract." As the legislative history shows (R. 210) "there will now be a contract arising by act of the parties, or imposed by statute."

I. Appellant is entitled to be free from price fixing arrangements in the course of interstate commerce pursuant to state legislation which does not conform with the Miller-Tydings Act and the McGuire Act. Schwegmann Bros. v. Calvert Distillers Corp., 341 U. S. 384 (1951); Esso Standard Oil Company v. Secatore's Inc., 246 F. 2d 17 (C. A. 1st, 1957).

Exemptions from the antitrust laws for price fixing "contracts or agreements" in interstate commerce pursuant to state enabling legislation authorized by the Miller-Tydings and the McGuire Acts are in derogation of the fundamental national policy expressed in the antitrust laws and must be strictly construed. In *United States v. McKesson and Robbins, Inc.*, 351 U. S. 305, 316 (1956), this Court held that:

> "* * * Congress has marked the limitations beyond which price fixing cannot go. We are not only bound by those limitations but we are bound to construe them strictly, since resale price maintenance is a privilege restrictive of a free economy."

Moreover, state legislation enacted pursuant to permissive enabling federal legislation must be of the kind contemplated by the Congress before exemption from federal antitrust statutory or administrative regulation may be accomplished. *F. T. C. v. Travelers Health Assn.*, 362 U. S. 293 (1960); *Grand Jury Investigation of Aviation Insurance Industry*, 183 F. Supp. 374 (S. D. N. Y., 1960).

Upjohn drugs and pharmaceuticals sold by retail pharmacies over the counter and by prescription are "in the stream" of interstate commerce (R. 98). *Cf. Northern California Pharmaceutical Assn. v. United States*, 306 F. 2d 379 (C. A. 9, 1962) *cert. den.*, 371 U. S. 862 (1962); *United States v. Utah Pharmaceutical Assn.*, 201 F. Supp. 29 (D. Utah, 1962). Over 90% of the prescriptions sold are dispensed by the pharmacists as precompounded by the manufacturer, without any significant change in form. 306 F. 2d at 386; 201 F. Supp. at 32.

II. The Ohio statute is a fundamental departure from the intent and purpose of the statutory "contract or agreement" system authorized by the Miller-Tydings and McGuire Acts. Its origin and purpose are derived from proposed Congressional legislation designed to jettison the resale price maintenance methods presently authorized.

A. *The Ohio statute is based upon the retention, by fiat of resale price maintenance statute, of a "proprietary interest" in the commodity which is the subject of resale price maintenance.* This statutory device was originated in 1957 in MacLachlan, *A New Approach to Resale Price Maintenance* (1957) 11 Vanderbilt L. Rev. 145.[11]

[11] A chart of sources of various provisions of the 1959 Ohio Fair Trade Law appears at the conclusion of "Summary of Argument."

It was the purpose of the proposed MacLachlan legislation to enact a *federal* resale price maintenance law based upon trade-marks in commerce. With its conception of "proprietary interest," the MacLachlan legislation would also "organize the market" for the trade-marked commodity at every level of distribution, on a national basis. J. A. MacLachlan, *Hearings on H. R. 10527 (Harris Bill)* etc. (1958), Eighty-Fifth Cong., Second Sess., 265.

The impetus for the proposed legislation arose from the conviction in Congress that, by the end of 1957 the "contract" method of maintaining fair trade prices had failed.[12] Many State Supreme Courts had declared the nonsigner provisions unconstitutional. This Court's ruling in *United States v. McKesson and Robbins, Inc.,* made clear that horizontal price fixing between a dual-distributing manufacturer and his wholesalers was prohibited. By the rulings in the Courts of Appeals for the Second and

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[12] H. Rep. No. 467, 86th Cong., 1st Sess., on H. R. 1253 (Harris Bill), 4-7, June 9, 1959. As of March 1, 1958, the Supreme Court of 13 states had declared the nonsigner clauses of their respective fair trade laws invalid:

Arkansas	Kentucky	Oregon
Colorado	Louisiana	South Carolina
Florida	Michigan	Utah
Georgia	New Mexico	
Indiana	Ohio	

The Supreme Courts of two states voided their entire fair trade acts; Nebraska and Virginia (reenacted March 1, 1958). These states joined with Missouri, Texas, Vermont and the District of Columbia as areas that had no fair trade acts. *Hearings on H. R.* 10527 (*Harris Bill*) etc., (1958) Eighty-fifth Congress, Second Session, 407 *Testimony of Herman S. Waller,* Counsel, National Association of Retail Druggists.

Fair Trade has now become constitutionally inoperative against nonsigners in over twenty states. Additionally, six states have no laws at all. Trade Reg. Rep., Pars. 6017, 6041; Alexander, *Quality Stabilization and the Crisis in Fair Trade* (1963) 51 Georgetown L. J. 783; H. Rep. 2352, 87th Cong., 2d Sess., on H. J. Res. 636 ("Quality Stabilization") 6-9, Sept. 12, 1962; H. Rep. No. 566, Eighty-eighth Cong., First Sess., on H. R. 3669 ("Quality Stabilization") 5-6, July 22, 1963.

Fourth Circuits in *General Electric Company v. Masters Mail Order Co. of Washington, D. C.*, 244 F. 2d 681 (C. A. 2d, 1957), *cert. den.* 355 U. S. 824 (1957), and *Bissell Carpet Sweeper Co. v. Masters Mail Order Co. of Washington, D. C., Inc.*, 240 F. 2d 684 (C. A. 4, 1957), it was held lawful for a mail order discount house, by consummating the sale of commodities in a nonfair trade state, to sell fair-traded merchandise at a discount in a fair trade state.

Moreover, many fair traders found burdensome the interpretations of Section 1 of the Sherman Act enunciated by this Court—applicable to *intrabrand* as well as to *interbrand* competition—that a combination or boycott instituted by a manufacturer and his distributors which sought to create, maintain or extend price fixing, with or without benefit of fair trade, was unlawful under Section 1 of the Sherman Act. *United States v. Bausch and Lomb Co.*, 321 U. S. 707 (1944); *United States v. Frankfort Distillers, Inc.*, 324 U. S. 293 (1945); *United States v. Parke, Davis and Co.*, 365 U. S. 125 (1961).

The proposals of Professor MacLachlan were carried over into the Harris Bills upon which hearings were held in 1958 and 1959 by the Congress,[13] and which were fa-

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[13] Hearings on such legislation were as follows: *Hearings Before a Subcommittee on the Committee on Interstate and Foreign Commerce*, House of Representatives, Eighty-fifth Congress, Second Session on H. R. 10527, H. R. 10770, H. R. 10847, H. R. 11048, H. R. 11216, and H. R. 11264, April 29, 30, May 1, 6, and 7, 1958; *Hearings Before the Committee on Interstate and Foreign Commerce*, House of Representatives, Eighty-sixth Congress, First Session, on H. R. 768, H. R. 1253, H. R. 2463, H. R. 2729, H. R. 3187, H. R. 5252, and H. R. 5062, March 16, 17, 18, 19, 20, 23, 24, and 25, 1959; *Hearings Before a Special Subcommittee on Fair Trade of the Committee on Interstate and Foreign Commerce*, United States Senate, Eighty-sixth Congress, First Session on S. 1083, June 15, 16, and July 10, 1959.

vorably reported upon by the House Committee on Interstate and Foreign Commerce.[14] None of these bills was ever enacted into law.

B. *The MacLachlan proposal, the Harris Bills and the Ohio Statute are based upon fundamental proposals relating to commerce upon which Congressional action is required, and which are wholly beyond the scope of the state legislation authorized by the Miller-Tydings and McGuire Acts.*

The MacLachlan proposal and every variation of the Harris Bill, including the Ohio Fair Trade Law of 1959 contain the basic provisions envisaged by Professor MacLachlan's suggested new approach:

1. Retention of a "proprietary interest" in the commodity by the proprietor of the trademark, brand or trade-name; and the giving of notice of such proprietary interest by the "proprietor."

2. Renunciation of *United States v. McKesson and Robbins, Inc.*, by permitting resale price maintenance by notice at the wholesale level by the "proprietor," although he sells in competition with wholesalers, so long as he sells at the applicable price established for comparable sales by distributors.

3. A legislative repeal of the "Masters Discount Mail Order House" cases by making unlawful the sale below "fair trade" price by any person with actual notice of the establishment of a resale price by the proprietor; and, by such provision, assisting in thwarting the "diversion" of merchandise by means of interstate sales by discounters.

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[14] House Rep. No. 467, Eighty-sixth Congress, First Session, June 9, 1959.

4. By direct statutory provision, or by implication, promoting cooperation by all distributors of merchandise of the same proprietor sold under the same mark in maintaining stipulated or minimum prices established by the proprietor.

The 1959 Ohio Fair Trade Law contains each and every of the foregoing provisions.[15]

In accordance with its recited objective of maintaining prices "in all appropriate stages in the distribution" of goods in the course of commerce, the Ohio Fair Trade Law authorizes an unlawful "organization of the market" at all levels of distribution by state authorized boycott, by unlawful horizontal price-fixing and by the attempted binding of third persons by notice of an unwarranted "proprietary interest" unlawfully created by the Ohio Legislature.

III. The Congress, the Virginia courts and the common law recognize that a "contract" may not be imposed by a "notice statute" upon a non-consenting third party.

A second source for various provisions of the 1959 Ohio Fair Trade Law was the Virginia Fair Trade Act of 1958. Code of Virginia, 1950, as amended, Sections 59-8.1 to 59-8.10. This statute is a "notice" statute. Section 59-8.2(10) defines "contracts" to provide that "acceptance for resale with actual notice shall be deemed to be assent to the terms of the 'contract.'"

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[15] The substance of the first three provisions also appears in variations of the "Quality Stabilization" bills reported on by the House Committee on Interstate and Foreign Commerce. H. Rep. No. 2352, 87th Cong., 1st Sess. (1962); H. Rep. No. 566, 88th Cong. 1st Sess. (1963). These bills retain the "proprietary interest" in the *trade-mark, brand or trade-name*, rather than in the *commodity*.

The Virginia Courts had previously held that the nonsigner clause of the prior Virginia Fair Trade Law was ineffective. *Benrus Watch Co., Inc. v. Kirsch*, 198 Va. 94, 92 S. E. (2d) 384 (1956). Following the enactment of the new statute, the Virginia Courts have held:

1. The "notice contract" statute is valid between trade-mark owner and direct purchaser. *Standard Drug Co., Inc. v. General Electric Co.*, 202 Va. 367, 117 S. E. (2d) 289 (1960).

2. Such a "contract by notice" *cannot* be effective between the trade-mark owner and third parties who acquire merchandise from a third person, e.g., an intervening wholesaler, who made no resale price maintenance contract with the purchaser. Otherwise the invalid nonsigner clause would be reinstituted. *Bulova Watch Company, Inc. v. Zale-Norfolk, Inc.*, No. 2570, Court of Law and Chancery, Norfolk, aff'd without opinion, Supreme Court of Virginia, March 1, 1962, Appendix B, p. 96 hereto.

With specific reference to the Virginia statute, the Congress of the United States has recognized that such a "contract by notice" statute under the federal enabling legislation is ineffective unless the McGuire Act be amended to permit resale price maintenance by "notice" as well as by "contract or agreement." The Harris Bill proposed such amendments to Section 5(a) (2), (3) and (4) of the McGuire Act. H. Rep. 467, Eighty-sixth Cong., First Sess. (1959) at 18.

The view of the Virginia Courts is in accord with the common law. *Garst v. Hall & Lyon Co.*, 179 Mass. 588, 61 N. E. 219 (1901).

IV. The Ohio Fair Trade Law frustrates the basic national policy expressed in the Lanham Act by creating a "proprietary interest" in a trade mark on goods in commerce, and the basic national policy expressed in the Federal Food, Drug, and Cosmetic Act by authorizing the removal of labels on drugs in commerce.

The Ohio Fair Trade Law frustrates basic national policy by creating a "proprietary interest" in a trade-mark on goods in interstate commerce. Such a "proprietary interest" is basic to the operation of the Ohio "implied contract" theory of fair trade law, approved by the Supreme Court of Ohio in this case. (R. 417, 418, 423.)

Such an interference with trade-marks in commerce is contrary to the federal preemption of trademarks in commerce, expressed by Congress in the Lanham Act.[16]

The 1959 Ohio law also creates a defense to the attempted enforcement of a fair trade contract by permitting the removal of a trade-mark (Section 1333.33 (D)). Such a removal is contrary to the national policy expressed by the provisions of the Federal Food, Drug, and Cosmetic Act, 21 U. S. C., Section 331(k), 67 Stat. 631.[17]

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[16] 15 U. S. C. Section 1127, 60 Stat. 44, Lanham Act, states in part:

"The intent of this chapter is to regulate commerce within the control of Congress by making actionable the deceptive and misleading use of marks in such commerce; to protect registered marks used in such commerce from interference by State, or territorial legislation. * * *"

[17] "The following acts and causing thereof are prohibited:

(k) The alteration, mutilation, destruction, obliteration, or removal of the whole or any part of the labeling of, or the doing of any other act with respect to, a food, drug, device, or cosmetic, if such act is done while such article is held for sale (whether or not the first sale) after shipment in interstate commerce and results in such article being adulterated or misbranded."

V. The Upjohn Company has "organized the market" for the distribution of its products in the course of commerce in the State of Ohio in an unlawful pattern on the basis of an unlawful statute.

A. *Noncontracting Retailers.* Upjohn has given "notice" to retailers like appellant that it has established minimum ~~or~~ "fair trade" prices for its products (R. 27).

B. *Contracting Retailers.* The Contracting retailers have signed contracts drawn by reference to Section 1333.28(I). The contract recites the retention by Upjohn of an interest in the "good will and public acceptance of the products bearing its trademarks, brands or names * * * so long as commodities bearing its trademarks, brands or names are offered for sale in commerce," (R. 25). Upjohn and the retailer agree that "Retailer may enjoy the benefit of the good will symbolized thereby by referring to said trademarks, brands or names in the promotion of sale of said commodities by Retailer." (R. 25.)

C. *Wholesalers.* Upjohn has organized price maintenance at the wholesale level either by notice to wholesalers (R. 95-96), or by *del credere* agency arrangement (R. 105-108). Such arrangements have been made with McKesson and Robbins, Inc., a manufacturer of "proprietary drugs" (R. 184) and also a competing wholesaler of Upjohn in drug sales to pharmacies of Upjohn products (R. 89). Such arrangements appear to violate both Section 5(a)(5) of the McGuire Act and the principles enunciated in *United States v. Masonite Corp.*, 316 U. S. 265 (1942).

VI. The Upjohn "notice contract" with appellant violates Section 1 of the Sherman Act.

The Upjohn resale price maintenance structure in Ohio originates and finds its place in an unlawful statutory scheme which is wholly beyond the federally authorized scope of state fair trade enabling legislation. The scheme originates in an impermissible "proprietary interest" retention upon commodities in commerce, which is sought to be combined with an impermissible "notice contract."

The Ohio legislation seeks to renounce the "contract or agreement" system created by the Miller-Tydings and McGuire Acts. It seeks to solve for "fair traders" the marketing problems they felt were generated by the decisions of this Court and of State Supreme Courts. In the interest of this "orderly," price-controlled fair trading at all levels of distribution, the Ohio Legislature has authorized contracts or arrangements totally at variance with basic antitrust objectives, to wit, horizontal price-fixing among competitors, and boycotts and combinations designed to keep merchandise from "discounters."

The "contract by notice" sought to be enforced by Upjohn against appellant violates Section 1 of the Sherman Act. It is given pursuant to an Ohio statute which violates the Supremacy Clause.

VII. The 1959 Ohio Fair Trade Law accomplishes a deprivation of due process under the Fourteenth Amendment by reason of an uncontrolled and arbitrary delegation of power over the property and business lives of others without any procedural safeguards.

The theory of the Harris Bills, incorporated into the Ohio law, was that a "proprietary interest" was to be retained by the proprietor *in the fair-traded commodity.* What was proposed by these Bills to be accomplished

by Act of Congress under the "commerce clause," the State of Ohio has attempted to accomplish by Act of Legislature.

The retention of the "proprietary interest" in the commodity by the "proprietor" is made mandatory by the terms of Section 1333.31 "so long as the commodity is identified by the trade-mark or trade name of the proprietor." [18] The mandatory definition, moreover, encompasses every trade name or trade-mark of the "proprietor," whether he be a "sham" or "token enforcer" of resale price maintenance[19] or a vigorous enforcer; or whether the trade-mark or trade name be "strong" or "weak" or "misleading" or the subject of pending injunction or cancellation proceedings, etc.

The "proprietary interest" is given life, however, only upon the arbitrary decision of the "proprietor" to "fair-trade" the commodity. The "proprietary interest" ceases upon the unilateral decision of the "fair-trader" to abandon resale price maintenance.

The proprietor's decision upon the retention of a "proprietary interest" is matched by the unilateral power given by the statute to the trade-mark owner over the business life of others. By Section 1333.29 (B) (1), (2), and (3), in his sole unfettered discretion, the "proprietor" can by notice or contract deputize and compel every person in his distribution system to assist in the enforcement of fair trade prices, both inside and outside of Ohio by controlling

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[18] Section 1333.31 provides:

"A proprietor shall retain a proprietary interest in any commodity with respect to which he is a proprietor after he has sold it to distributors, so long as such commodity continues to be identified by his trademark or trade name, by reason of his interest in stimulating demand for such commodity through effective distribution to ultimate consumers and of his interest in continuing protection of the good will associated with his trade-mark or trade name."

[19] Note: *The Operation of Fair Trade Programs* (1955), 69 Harv. L. Rev. 316, 331-332.

the identity of the persons to whom an Ohio distributor may resell. The stream of interstate and intrastate commerce at wholesale and retail levels may be effectively dammed up unless resale is effected within lines demarcated by the proprietor, i.e.:

(a) resale by the initial vendee at the fair trade price for his particular level of distribution; and

(b) resale to subsequent vendees who observe fair trade at their respective levels of distribution; and who will in turn require observance by their subsequent vendees.

In *Old Dearborn Distributing Company v. Seagram Distillers Corp.*, 299 U. S. 183 (1936), the statute before this Court permitted only resale price maintenance. This Court held that such a statute does not unlawfully delegate legislative authority, nor does it violate due process.

The conferring by the State of Ohio of an unrestrained discretion upon "proprietors" over the business life of others in the use of their property, in addition to the control of the resale price, clearly constitutes an unlawful delegation of legislation to private persons without any procedural safeguards or standards whatsoever. In so doing, the State of Ohio has violated the rights of appellant under the Due Process Clause of the Fourteenth Amendment. *Washington ex rel. Seattle Trust Co. v. Roberge,* 278 U. S. 116, 121 (1928); *Carter v. Carter Coal Co.*, 298 U. S. 238, 311 (1936); Note, *Delegation of Power to Private Parties,* 37 Colum. L. Rev. 447, 458 (1937); Jaffe, *Law Making by Private Groups,* 51 Harv. L. Rev. 201, 217 (1938). *Cf. Silver v. New York Stock Exchange,* 373 U. S. 341, 364-366 (1963).

Since so many Courts in recent years have declined to give effect to the reasoning and philosophy of the *Old Dearborn* case, *supra,* it is urged that this Court reconsider its views in that case.

SOURCES OF VARIOUS PROVISIONS OF 1959 OHIO FAIR TRADE LAW

Ohio Rev. Code §§ 1333.27-1333.34	MacLachlan Proposal	Harris Bill H. R. 10527 85th Cong. 2d Sess.	Virginia Law (June 27, 1958) (§§ 59-8.1 to 59-8.10, Code of Virginia, 1950 as Amended)	Harris Bill H. R. 1253 86th Cong., 1st Sess. H. Rep. No. 467
Recital of Purpose of Maintaining prices at all "appropriate stages" of distribution § 1333.27(B)				H. Rep. No. 467 86th Cong., 1st Sess. at 16
"Proprietor" § 1333.28(A)	§ 2	§ 5		§ 5(A)
"Proprietary Interest" § 1333.31	§ 2	§ 5		§ 5(B)
"Contract" § 1333.28(I)			Defined to Include Notice § 59-8.2(10)	
Consideration § 1333.28(I)				
Acquisition of Commodity with Notice	§ 2	§ 5		§ 7
"Notice" § 1333.28(J)	§ 2	§ 5		§ 5(C)
Methods of Conveying Notice, e.g., by mail, notice on merchandise, containers, actual notice; notice that price is subject to change (§ 1333.30)	§ 2	§ 5		
Establishment of Resale Prices by contract or by notice (§ 1333.29)	§ 3 (Notice only)	§ 5 (Notice only)		§ 6 (Notice only)
Differentiation of Prices at levels of distribution § 1333.29(A)	§ 3	§ 5		§ 6
Establishment of Wholesale and Retail Prices although Proprietor Competes with Wholesaler § 1333.29(A)	§ 3	§ 5		§ 6
Buyer will not resell at less than minimum price for his level of distribution § 1333.29(B)	§ 3	§ 5		
Buyer will require distributor to get resale price agreement of every other distributor, plus agreement to get an agreement § 1333.29(B)				
Seller will require from any other distrib-			§59-8.3 (c)(1)	

"Proprietary Interest" § 1333.31	§ 2	§ 5		§ 5(B)
"Contract" § 1333.28(I)			Defined to Include Notice § 59-8.2(10)	
Consideration § 1333.28(I)				
Acquisition of Commodity with Notice	§ 2	§ 5		§ 7
"Notice" § 1333.28(J)	§ 2	§ 5		§ 5(C)
Methods of Conveying Notice, e.g., by mail, notice on merchandise, containers, actual notice; notice that price is subject to change (§ 1333.30)	§ 2	§ 5		
Establishment of Resale Prices by contract or by notice (§ 1333.29)	§ 3 (Notice only)	§ 5 (Notice only)		§ 6 (Notice only)
Differentiation of Prices at levels of distribution § 1333.29(A)	§ 3	§ 5		§ 6
Establishment of Wholesale and Retail Prices although Proprietor Competes with Wholesaler § 1333.29(A)	§ 3	§ 5		§ 6
Buyer will not resell at less than minimum price for his level of distribution § 1333.29(B)	§ 3	§ 5		
Buyer will require distributor to get resale price agreement of every other distributor, plus agreement to get an agreement § 1333.29(B)				
Seller will require from any other distributor (a) no resale at less than price stipulated for distributor's level of distribution, (b) distributor will require same agreement from another distributor to whom he may resell § 1333.29(B)			§59-8.3 (c)(1)	
Third Party Beneficiary Provision in favor of Proprietor and any distributors bound by similar contract or notice § 1333.29(C)				
Permissible Removal of Trade Mark § 1333.33 (D)				
Horizontal Price fixing prohibited except as permitted in § 1333.29			§ 59-8.10	
Cooperation by Distributors with Proprietor expressly or impliedly authorized 1333.29 (B)	§7 (Express Provision)			§ 10 (By implication)

ARGUMENT.

I. By reason of the histpric illegality of price fixing, the history of "fair trade" legislation is one of reluctance to create or extend the exemption from the antitrust laws for private price fixing in commerce.

1. The history of resale price maintenance legislation has been characterized by stormy and turbulent advocacy and opposition. "Few subjects of direct concern to business—both small and large—engender more acrid controversy than that of fair trade." Report of Senate Select Committee on Small Business on Fair Trade, Sen. Rep. No. 2819, Eighty-fourth Cong., 2d Sess. (1956) 1.

Although demands for Federal legislation covering articles sold in interstate commerce took form in 1912 shortly after this Court rendered its decision in the *Miles Medical* case, 220 U. S. 373 (1911), it was twenty-five years before an enabling act was passed by the Congress—and then only after the Miller-Tydings Bill was attached as a rider to a District of Columbia Appropriation Bill.[20]

When the McGuire Act was before the Congress, it was reported out of the Senate Committee on Interstate

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[20] S. Rep. 879, 75th Cong., 1st Sess., Report to accompany H. R. 7472, July 6, 1937, Providing Additional Revenue for the District of Columbia, p. 5; 81 Cong. Rec. 7486-7487. The bitterness of the division over the legislation clearly appears in the historic Senate debate. 81 Cong. Rec. 7488-7497. The extended history of the first twenty-five years of legislative effort is recounted in *Schwegmann Bros. vs. Calvert Distillers Corp.*, 341 U. S. 384 (1951); Federal Trade Commission, Report on Resale Price Maintenance (1945) 36-66. Neither the eloquence nor appearances of Mr. Louis Dembitz Brandeis could move the Congress to enact resale price maintenance legislation, let alone still controversy in the Committee. Hearings before the House Committee on Interstate and Foreign Commerce on H. R. 13305 (Stevens Bill), 63d Cong., 2d and 3d Sess. (1915), reproduced in *Hearings Before the House Committee on Interstate and Foreign Commerce on H. R. 11* (Capper-Kelly) Sixty-ninth Cong., First Sess. at 80 *et seq.*, esp. 116-117.

and Foreign Commerce without recommendation. Sen. Rep. No. 1741, Eighty-second Cong., First Sess. (1952). The debate upon the McGuire Act was long and hard, both in the House and the Senate.[21] In the House of Representatives, the debate was characterized by a three way conflict: among opponents and proponents of any legislation; and by a jurisdictional conflict between the House Judiciary Committee and the House Committee on Interstate and Foreign Commerce. The conflict between the Committees of the House revolved about the best method of amending the Miller-Tydings Act.[22] The upshot of the long, searching

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[21] 98 Cong. Rec., Part 4, 82d Cong., 2d Sess., pp. 4896-4926; 4933-4956 (House of Representatives); 98 Cong. Rec., Part 7, 82d Cong., 2d Sess., pp. 8716-8748; 8819-8858; 8865-8873; 8881-8892. (Senate.) The debate was preceded by an extensive Report on "Fair Trade: The Problem and the Issues" by the Select Committee on Small Business, H. Rep. No. 1292, 82d Cong., 2d Sess. (1952), in which the Committee stated its belief (p. 1) that "the states should retain jurisdiction over retail trade practices and that Congress should make it possible to enforce fair trade contracts in interstate commerce." In H. Rep. No. 1437 on H. R. 5767, 82d Cong., 2d Sess., the Committee on Interstate and Foreign Commerce recommended passage of the measure.

[22] 98 Cong. Rec., Part 4, 82nd Cong., 2d Sess., esp. 4934-4956. The conflict in debate in 1952, and the careful scrutiny of the McGuire Act are reflected in the 1959 Fair Trade Hearings before the Committee on Interstate and Foreign Commerce of the House of Representatives. 86 Cong., 1st Sess., H. R. 1253 (Harris Bill). Mr. John W. Anderson, President, American Fair Trade Association and President, Quality Brands Association of America, Inc., stated 652 to 653:

> "We had some doubts about the Miller-Tydings Act, for reasons that should not be discussed here, and those doubts were proved well founded when the courts later virtually disabled the Miller-Tydings Act.
>
> "Then a new act became necessary, and the McGuire bill was presented by the druggists; The American Fair Trade Council being not satisfied with the structure of the McGuire bill, presented the Keogh bill, which was referred to the committee that deals with trademarks, the Judiciary, Congressman Celler's Committee.

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debate was a close, careful scrutiny of the McGuire Act both in principle, and word for word.

There would not appear to be room for argument that Congress intended a "liberal" construction to be given

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"This Commerce Committee before which I speak, showed no preference for the Keogh legislative text and (sic) adopted it verbatim except that section 4, a new section 4, was substituted for section D of the Keogh text. Our section D was intended to prevent the invasion of a fair-trade State from across its borders by cut prices. We were told and assured—and there is overwhelming documentation, I might say, of the fact that everybody was assured by sponsors of the original draft of the McGuire bill, that the new section 4 would hold against that interstate discounting. We of AFTC could not believe it would.

"There was prepared in a conference in which the druggists and the beverage industries and the diversified fair-trading industries were represented, what came to be known as the hometown amendment, and all present agreed to support that amendment to cure the doubt. At least, that existed as to whether section 4 would hold. That support was not given and the amendment was defeated.

"Section 4, when it finally came to a Federal court test, was destroyed. And thereupon the floodgates were open. Fair-trade States were invaded by discounters of all kinds, mail order and what-not, and we believe that that cruel invasion of fair-trade States that had non-signer clauses which bound nonsigners to the fair-trade prices on these popular products—the fact that they were bound there to fair-trade prices while they were destroyed or seriously injured by the invasion of price cutters—we feel that that fact influenced State courts to find some reason for destroying the nonsigner clause.

"And as you men know, in many States that nonsigner clause was destroyed in the manner and for the reasons the American Fair Trade Council predicted it would be.

"I am not going to burden this record with documentation supporting those statements, but if it is desired at any time, I shall be happy to supply it.

"Now, as I say, the Keogh bill was to be moved over verbatim under the McGuire head. And I thought that was a fine idea until I saw how the bill had been altered. And so, as a result, the McGuire Act failed our economy, failed the reseller, failed the manufacturer, and failed the public. It became necessary then for the third time to have a new act. Now, with two strikes on us, we again face this honorable committee."

either the Miller-Tydings Act or the McGuire Act.[23] The purpose of the McGuire Act was merely to "shore up" the non-signer contract provisions in the state fair trade legislation enacted pursuant to Miller-Tydings. The strict construction generally given exemptions from the antitrust laws and, more specifically the exemption for resale price maintenance, accords with the history of such legislation.

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[23] While the debate in the House contains references to the desirability of free operation of state policy in resale price maintenance, 98 Cong. Rec. 4901 (1952) (remarks of the Sponsor, Rep. McGuire) the purpose and intent of the McGuire Act was limited. As stated by Rep. Priest, Chairman of the House Interstate and Foreign Commerce Subcommittee which considered and reported on the McGuire Bill:

> "We concluded in the Committee on Interstate and Foreign Commerce that the best approach was to pass legislation *permitting, mind you, permitting the State fair-trade laws that have been enacted* and adopted by the States to be operative and to be effective without constituting a burden on interstate commerce." 98 Cong. Rec. 4936. (Italics added.)

The Sponsor of the measure, Mr. McGuire, stated:

> "The McGuire bill adds no new powers to the Federal Trade Commission Act. It merely exempts from the Federal Trade Commission Act and the Antitrust Acts so far as interstate commerce is concerned *that type of resale price maintenance contract which is permitted by the fair-trade acts of 45 States.*" 98 Cong. Rec. 4900-4901. (Italics added.)

Rep. Harris, the next senior majority member of Mr. Priest's Subcommittee stated:

> "The Supreme Court of the United States, however, held—*and that is what we are here to correct today—that the Miller-Tydings Act applied only to those who were parties to the contract.* The majority of the court held that in non-signer cases, the Miller-Tydings Act did not apply.
>
> About the same time, another problem arose with reference to articles which cross State lines in the course of a retail sale. That case came from Pennsylvania—the Wentling case. The court of appeals said that the fair-trade law of the State of Pennsylvania could not apply to articles which were sent across Pennsylvania State boundaries into other States.

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Although many resale price maintenance bills have been introduced into the Congress since the enactment of the McGuire Amendment to the Federal Trade Commerce Act, none has passed, and all have encountered powerful opposition.[24] The Department of Justice and the Federal Trade Commission have opposed resale price maintenance legislation; and they have been joined in such opposition by the American Bar Association, among others.

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> *As a consequence of these decisions we bring the McGuire Bill to you today.*" 98 Cong. Rec. 4913. (Italics added.)

Rep. Dolliver, the ranking minority member of the Subcommittee, stated:

> "*The whole purpose of these bills that are now before us, or at least the main purpose, is to correct those decisions that were made by the courts*, so that the States in question if they decide so to do may sustain and have in their respective jurisdictions vertical retail price fixing." 98 Cong. Rec. 4900. (Italics added.)

In the Senate, Senator Humphrey, the spokesman for the measure, stated:

> "The pending bill changes no Federal policy. *It changes no State law. It adds nothing whatsoever new to the fair-trade policy.* It has only one purpose, namely, to clarify a law which the Supreme Court found, by a split decision, not to cover certain practices.
>
> *Therefore, Mr. President, the purpose of the pending bill is only to plug the loopholes in the Federal Miller-Tydings Act, which is a measure to enable the States to carry out fair-trade practices.*" 98 Cong. Rec. 8819. (Italics added.)

The purpose of the McGuire Act to overturn the Schwegmann and Wentling decisions and the limited scope of the statute are generally understood. The National Wholesale Druggists' Association, *The Basis and Development of Fair Trade* (3rd Ed., 1955) at 12, 91.

[24] Hearings on such legislation have been held in recent years as follows: *Hearings Before a Subcommittee of the Committee on Interstate and Foreign Commerce, House of Representatives, Eighty-fifth Congress*, Second Session on H. R. 10527, H. R. 10770, H. R. 10847, H. R. 11048, H. R. 11216, and H. R. 11264, April 29, 30, May 1, 6, and 7, 1958; *Hearings Before the*

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The highest courts of twenty-four states, have, in one manner or another, declared their nonsigner fair trade provisions unconstitutional. Four states and the District of Columbia have never enacted fair trade laws. Both by state court and federal decision, the enforcement of exist-

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Committee on Interstate and Foreign Commerce, House of Representatives, Eighty-sixth Congress, First Session on H. R. 768, H. R. 1253, H. R. 2463, H. R. 2729; H. R. 3187, H. R. 5252, and H. R. 5602, March 16, 17, 18, 19, 20, 23, 24, and 25, 1959; *Hearings Before a Special Subcommittee on Fair Trade of the Committee on Interstate and Foreign Commerce, United States Senate, Eighty-sixth Congress*, First Session on S. 1083, June 15, 16, and July 10, 1959; *Hearings Before a Subcommittee of the Committee on Interstate and Foreign Commerce, House of Representatives, Eighty-seventh Congress*, Second Session on H. J. Res. 636, H. J. Res. 637, H. J. Res. 639, H. J. Res. 679, H. R. 10335, H. R. 10340, H. R. 10517, H. R. 11227, H. R. 11346 and H. R. 11778, June 11, 12, 13, 14, 15, 1962; *Hearings on S. J. Res. 159 before a Subcommittee of the Senate Committee on Commerce, Eighty-seventh Cong.*, Second Sess. (1962); *Hearings before a Subcommittee of the Committee on Interstate and Foreign Commerce, House of Representatives, Eighty-eight Congress*, First Session on H. R. 3669, April 23, 24, 25, 26; May 14 and 15, 1963.

In addition, hearings were held before a Subcommittee of the Select Committee on Small Business, United States Senate, Eighty-fifth Congress, Second Session on *Competitive Impact of Discount House Operations on Small Business*, June 23, 24, and 25, 1958.

Both the Harris Bill and the Quality Stabilization Bill have been reported favorably by the Committee on Interstate and Foreign Commerce of the House of Representatives, H. Rep. No. 467, Eighty-sixth Cong., First Session, on H. R. 1253, June 9, 1959 ("Harris Bill"); H. Rep. No. 2352 on H. J. Res. 636, 87th Cong., 2nd Sess. (1962) ("Quality Stabilization"); H. Rep. No. 566, Eighty-eighth Congress, First Session, on H. R. 3669, July 22, 1963 ("Quality Stabilization Bill").

Hearings on the pending "Quality Stabilization" legislation, S. 774, before the Special Subcommittee on Quality Stabilization of the Committee on Commerce of the United States Senate have been in progress during the current session. In the present Congress, a host of bills have been introduced into the House relating to "Quality Stabilization" and fair trade. Weston, *Fair Trade Alias "Quality Stabilization": Status, Problems and Prospects* (1963) 22 ABA Antitrust Section: Vertical Arrangements 76, 96, nn. 92, 93.

ing fair trade legislation has been made difficult. H. Rep. No. 566, Eighty-eighth Cong., First Sess. (1963) at 5; Alexander, *Quality Stabilization and the Crisis in Fair Trade* (1963) 51 Georgetown L. J. 783-795.

2. Upjohn drugs and pharmaceuticals sold by retail pharmacies over the counter and by prescription are "in the stream" of interstate commerce. *Cf. Northern California Pharmaceutical Assn. v. United States,* 306 F. 2d 379 (C. A. 9, 1962), *cert. den.,* 371 U. S. 862 (1962); *United States v. Utah Pharmaceutical Assn.,* 201 F. Supp. 29 (D. Utah, 1962). Over 90% of the prescriptions sold are dispensed by the pharmacists as precompounded by the manufacturer, without any significant change in form. 306 F. 2d at 386; 201 F. Supp. at 33.

3. In *White Motor Company v. United States,* 372 U. S. 253, 260 (1963), this Court reiterated the historic premise that:

> "Price-fixing arrangements, both vertical (*United States v. Parke, Davis & Co.,* 362 U. S. 29, 80 S. Ct. 503, 4 L. Ed. 2d 505; *Dr. Miles Medical Co. v. John D. Park & Sons Co.,* 220 U. S. 373, 31 S. Ct. 376, 55 L. Ed. 502) and horizontal (*United States v. Socony Vacuum Oil Co.,* 310 U. S. 150, 60 S. Ct. 811, 84 L. Ed. 1129; *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons,* 340 U. S. 211, 71 S. Ct. 259, 95 L. Ed. 219), are per se violations of the antitrust laws * * *."

In *White Motor,* this Court also reiterated (372 U. S. at 260) that:

> "In any price-fixing case, restrictive practices ancillary to the price-fixing scheme are also quite properly restrained. Such was *United States v. Bausch & Lomb Optical Co.,* 321 U. S. 707, 64 S. Ct. 805, 88 L. Ed. 1024, where price fixing was 'an integral part of the whole distribution system,' including customer restrictions."

4. Exemptions from the antitrust laws for price fixing "contracts or agreements" in interstate commerce pursuant to enabling legislation authorized by the Miller-Tydings and the McGuire Acts are in derogation of the fundamental national policy expressed in the antitrust laws and have been strictly construed. In *United States v. McKesson and Robbins, Inc.*, 351 U. S. 305, 316 (1956), this Court held that:

> "* * * Congress has marked the limitations beyond which price fixing cannot go. We are not only bound by those limitations but we are bound to construe them strictly, since resale price maintenance is a privilege restrictive of a free economy."

Accord: *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U. S. 384, 388; *General Electric Co. v. Masters Mail Order Co. of Washington, D. C., Inc.*, 244 F. 2d 681, 683 (C. A. 2d, 1957), *cert. den.* 355 U. S. 824 (1957).

5. This Court has consistently held that exemptions, which are specific exceptions to the general command of the antitrust laws, should be narrowly construed and applied only where any conditions for exemption are clearly satisfied. Pogue, *The Rationale of Exemptions from Antitrust*, 19 ABA Antitrust Section: Regulated and Exempt Industries (1961) 313, 327. This Court has continued to hold that repeals of the antitrust laws by implication from a regulatory statute are strongly disfavored, and have only been found in cases of "plain repugnancy between the antitrust laws and the regulatory provisions." *United States v. Philadelphia National Bank*, 374 U. S. 321, 350-351 (1963).

6. Where the fair trade transaction involves interstate commerce, the fair trade contract must comply with the federal fair trade enabling legislation as well as the

state or local fair trade acts in order for the transaction to be exempted from the Federal antitrust laws. "The fact that a state authorizes the price fixing does not, of course, give immunity to the scheme, absent approval by Congress." *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U. S. 384, at 386 (1951). "* * * When a state compels retailers to follow a parallel price policy, it demands private conduct which the Sherman Act forbids. Parker v. Brown, 317 U. S. 341, 350 (1943)." *Ibid,* at 389.

Differences between the federal enabling legislation and state or local acts, reflected in a fair trade contract drawn pursuant to the nonconforming local act, will remove the federal exemption for the fair trade contract. "A distributor of a trade-marked article may not lawfully limit by agreement, express or implied, the price at which or the persons to whom its purchaser may resell, except as the seller moves along the route which is marked by the Miller-Tydings Act." *United States vs. Bausch and Lomb Co.,* 321 U. S. 707, 721 (1944).

7. Moreover, state legislation enacted pursuant to permissive enabling federal legislation must be *of the kind* contemplated by the Congress before exemption from federal regulation may be accomplished. *F. T. C. vs. Travelers Health Assn.*, 362 U. S. 293 (1960); *Grand Jury Investigation of Aviation Insurance Industry,* 183 F. Supp. 374 (S. D. N. Y., 1960).

II. The Ohio law exceeds any permissible limits of Federal Enabling Legislation. Its provisions are derived from proposed Congressional "proprietary interest" national fair trade legislation, formulated and intended to supersede the Miller-Tydings and McGuire Act systems of state enabling legislation for resale price maintenance "contracts or agreements."

A. The McGuire Act was enacted to give validity to non-signer provisions of state fair trade legislation.

Schwegmann Bros. vs. Calvert Distillers Corp., 341 U. S. 384 (1951), held that the Miller-Tydings amendment did not make binding upon nonsigners resale prices fixed in contracts under state fair trade laws.

In the course of its Opinion, this Court noted that "had Congress desired to eliminate the consensual element from resale price fixing by a single contract binding by 'coercion' upon nonsigners, *either* a nonsigner provision would have been included *or* resale price fixing would have been authorized without more." 341 U. S. at 390.

In amending the federal enabling legislation to undo the result in *Schwegmann* by the McGuire Act, Congress did not authorize "resale price fixing * * * without more." In the "normal and customary meaning" of words (341 U. S. at 388), Congress authorized only state enabling legislation for price fixing "contracts or agreements." [25]

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[25] The McGuire Act also provided that neither "the making of contracts or agreements" pursuant to state fair trade laws nor the enforcement thereof shall constitute an unlawful burden on interstate commerce. Section 5(a)(4). The purpose of this provision was to remove any obstacle in the way of an application of state fair trade laws to retail transactions or advertising originating in a fair trade state but crossing state lines. Such an obstacle had been suggested in *Sunbeam Corporation v. Wentling*, 185 F. 2d 903 (CA 3d, 1950), *cert. granted, judgment vacated and remanded* (341 U. S. 944 (1951)) *for consideration in the light of the Schwegmann case.*

B. By the end of 1957, the "contract or agreement" approach of Miller-Tydings and McGuire had broken down.

By the end of 1957, it was the opinion of proponents of fair trade that resale price maintentance by means of a federally enabled system of state authorized "contracts or agreements" had failed. In the numerous hearings since 1958, the Congress was made acquainted with, and its Committee Reports from 1959 to date acknowledge the breakdown of resale price maintenance by "contract or agreement." [26] The reasons given by the proponents of the new legislation for the failure of Miller-Tydings and McGuire were at least four-fold: [27]

(a) In many states, the nonsigner clause of state "fair trade" laws had been declared unconstitutional; other states had declared their entire fair trade laws invalid; four states and the District of Columbia had no such laws. H. Rep. No. 467, Eighty-sixth Congress, First Session to accompany H. R. 1253 (Harris Bill) June 19, 1959, 6.

(b) This Court in *United States v. McKesson and Robbins, Inc.*, 351 U. S. 305 (1956) held invalid, pursuant to Section 5(a)(5) of the McGuire Act, price fixing "contracts or agreements" of a drug manufacturer and wholesalers of the manufacturer's products where the manufacturer was also a competing wholesaler. The ruling in the *McKesson* case was regarded as a further blow to fair

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[26] *Supra*, note 24; H. Rep. No. 467, 86th Cong., 1st Sess. (1959) 4-7; H. Rep. No. 2352, 87th Cong., 2d Sess. (1962) 6-9; H. Rep. No. 566, 88th Cong., 1st Sess. (1963) 3-6.

[27] E.g., Statement of Herman T. VanMell, Vice President and General Counsel, Sunbeam Corporation, *Hearings on Competitive Impact of Discount House Operations on Small Business*, 85th Congress, 2nd Session (1958), 417-421; Testimony of Herman S. Waller, Counsel, National Association of Retail Druggists, *Hearings on H. R. 10527 ("Harris Bill"), etc.*, 85th Congress, 2nd Session, pages 540 to 563.

trade, since it inhibited the "orderly marketing of goods" at the wholesale level. *E.g.*, Testimony of Herman S. Waller, Counsel, National Association of Retail Druggists, Hearings, *supra* note 27, 548.

(c) *General Electric Co. vs. Masters Mail Order Co. of Washington, D. C., Inc.*, 244 F. 2d 681 (CA 2d, 1957), *cert. den.*, 355 U. S. 824 (1957), held lawful the establishment by a retailer doing business in a fair trade state of an office in a nonfair trade jurisdiction, and the sale of merchandise below the fair trade price by means of the parties to the sale agreeing to the passage of title in the nonfair trade jurisdiction. H. Rep. No. 467, 86th Congress, First Session to accompany H. R. 1253 (Harris Bill), June 19, 1959, 7.

(d) Additional reasons given at various Hearings for the crippling of fair trade arose out of the enforcement by the Department of Justice of the settled rule of antitrust law that a boycott, or cooperative or combined efforts may not lawfully be utilized to institute, maintain or extend pricing systems in commerce. *United States vs. Frankfort Distillers, Inc.*, 324 U. S. 293 (1945); *United States vs. Parke, Davis & Co.*, 362 U. S. 29 (1960).[28]

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[28] Consent decrees have recently been entered against a number of pharmaceutical associations prohibiting price activity by horizontal arrangement. *U. S. v. Nassau-Suffolk Pharmaceutical Society, Inc.*, 1963 Tr. Cas., Par. 70,937 (E. D. New York, 1963) ("drug products or related goods"); *U. S. v. Ibid.*, Par. 70,396 (E. D. New York, 1963) ("prescription drugs or professional services"); *U. S. v. Hawaii Retail Druggists Assn.*, 1963 Tr. Cas., Par. 70,914 (D. Hawaii, 1963), ("any drug product or related goods"); *U. S. v. Arizona Pharmaceutical Assn. et al.*, 1963 Tr. Cas., Par. 70,614 (D. Arizona, 1963), ("prescription drugs"); *U. S. v. Idaho State Pharmaceutical Assn., Inc.*, 1963 Tr. Cas., Par. 70,689 (D. Idaho, 1963), ("prescription drugs"); *U. S. v. Northern California Pharmaceutical Assn.*, 1963 Tr. Cas., Par. 70,690 (N. D. California, 1963) ("prescription drugs").

(Continued on following page)

C. The proposals to cure the breakdown of the Congressional enabling legislation sought to give relief from the "contract or agreement" approach to fair trade.

The hearings in the Ohio Legislature on the 1959 Fair Trade Act were held before the House Judiciary Committee on April 15, April 23, April 29, and May 28, 1959, and before the Senate Judiciary Committee on June 4, and June 9, 1959 (R. 161-366). Between January 11, 1958, the date of the declaration of unconstitutionality of the 1936 Ohio Fair Trade Law, and the conclusion of the hearings before the Senate Judiciary Committee of the Ohio Legislature on June 9, 1959, the draftsmen of the new Ohio Fair Trade Legislation had available to them at least the following materials:

1. MacLachlan, *A New Approach to Resale Price Maintenance* (1957) 11 Vanderbilt L. Rev. 145.

2. *H. Rep. Hearings on H. R. 10527*, Eighty-fifth Cong., Second Sess. (introduced by Representative Harris), etc., April 29, 30, May 1, 6, and 7, 1958.

(Continued from preceding page)

The decree in the *Nassau-Suffolk Pharmaceutical* case, 1963 Tr. Cas., Par. 70,937, 78,735 provides:

"Defendant Nassau-Suffolk Pharmaceutical Society, Inc., is hereby enjoined and restrained from directly or indirectly:

* * *

(E) Advocating, suggesting, urging, inducing, compelling, coercing or in any other manner influencing or attempting to influence any manufacturer *to enforce fair trade prices* for the products of such manufacturer;

(F) *Notifying or otherwise advising any manufacturer of sales of its products at less than fair trade prices or threatening, warning or advising any druggist that it will do so;*

(G) *Instigating or instituting lawsuits to maintain fair trade prices*, recommending or suggesting attorneys or paying legal fees or expenses or collecting evidence therefor, or threatening or warning any druggist that it will do so." (Italics added.)

3. *Hearings on Competitive Impact of Discount House Operations on Small Business,* Eighty-fifth Cong., Second Sess., June 23, 24 and 25, 1958.

4. Enactment of Virginia Fair Trade Law, Virginia Acts of Assembly, 1958, Chapter 259, Approved March 8, 1958, effective June 27, 1958. (Code of Virginia, as amended, Sections 59-8.1 to 59-8.10.)

5. *H. Rep. Hearings on H. R. 1253* (introduced by Representative Harris), etc., Eighty-sixth Cong., First Sess., March 16, 17, 18, 19, 20, 23, 24, and 25, 1959.

6. *Senate Hearings on S. 1083* (Humphrey-Proxmire Bill, same as H. R. 1253), Eighty-sixth Cong., First Sess., June 15, and 16, July 10, 1959.

The conception of the retention of a "proprietary interest" in merchandise identified by the trade-mark of a "proprietor" was originated by Professor James A. MacLachlan in *A New Approach To Resale Price Maintenance* (1957), 11 Vanderbilt L. Rev. 145. The bill suggested by Professor MacLachlan was devised at the request of proponents of resale price maintenance who "requested advice on * * * whether their case merited a fresh legal approach: Professor MacLachlan's objectives (11 Vanderbilt L. Rev. 146-147) were to formulate a *national* fair trade law, not merely an enabling act, and thereby:

a. Withdraw the word "fair" from the resale price maintenance controversy;

b. "More fundamentally," clarify issues "by renouncing the device of the nonsigner clause. *Where antagonism is not aroused by the use of the Fair Trade label, it can flow from a sense of outrage at holding a man to a contract he never made.*"

In "such a matter of national concern, Congress should take the lead in determining national policy." (11 *Vanderbilt L. Rev.* at 147).

Before the Congress, Professor MacLachlan took responsibility for drawing up the first Harris Bill. (Hearings on H. R. 10527, etc. (1958), Eighty-fifth Cong., Second Sess. 267.) He also stated that "*this bill does not proceed upon a contract theory, so nobody is going to be held for a contract he did not sign.*" *Ibid.*, at 263.

In order to overcome the failure of the "contract or agreement" system, binding upon nonsigners, the bill had the fundamental objective of permitting the proprietor to organize the market "at the various stages of distribution," and in co-operation with his distributors. (11 *Vanderbilt L. Rev.* at 151).

D. The Ohio law derives from proposed national fair trade legislation.

The proposed 1958 and 1959 Congressional legislation and the Ohio Fair Trade Law of 1959 were drafted in order to "by-pass" the entire "contract or agreement" method of establishing and maintaining resale prices. The Ohio Legislative proceedings which produced the 1959 Act (R. 193-366) ignored the hard-fought and "acrid" history of the Federal legislation. The Ohio Legislature therefore readily approved a departure in fair trade law which made every "distributor" with "notice" a "contractor."

1. The minority of the Supreme Court of Ohio has held that the "heart of the new Act" is the theory of implied contract. (R. 415.) The subject matter of the implied contract is the "proprietary interest" devised for enactment *by the Congress* by the Harris

and "Quality Stabilization" bills. The minority of the Supreme Court of Ohio found that a valid "proprietary interest" on goods in commerce may be retained by the proprietor *by fiat of the Ohio Legislature.* The "proprietary interest" thus created and authorized may, in the opinion of the minority of the Ohio Supreme Court (R. 418), be "appropriated" like a candy bar.

As will be argued more fully hereinafter, the State of Ohio appears to have taken over the role and powers of Congress in our Federal System.

2. Section 5(a)(5) of the McGuire Act and the parallel provision of the Miller-Tydings Act prohibit horizontal price fixing. The MacLachlan proposal and the Harris Bill proposed to amend Section 5(a)(5) to overturn *United States v. McKesson and Robbins, Inc.*, 351 U. S. 305 (1956).

By Section 1333.29(A),[29] the Ohio law specifically authorizes what Section 5(a)(5) of the McGuire Act prohibits.

3. The MacLachlan proposal and the Harris Bills expressly or impliedly authorized cooperation among distributors and proprietors to maintain the resale price.[30]

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[29] "A proprietor may * * * establish such minimum resale prices for his wholesale distributors, notwithstanding Section 1333.34 of the Revised Code, even though he sells such commodity to retailers in competition with such wholesale distributors, if such sales to retailers are made at prices not less than those he establishes for such wholesale distributors for comparable sales."

[30] The first Harris Bill provided:

"* * * All distributors of the merchandise of the same proprietor sold under the same mark or name may cooperate with him in maintaining the stipulated or minimum prices estab-

(Continued on following page)

In the interest of the "orderly marketing of goods" by means of resale price maintenance, the Ohio law authorizes proprietors, by contracts or notices, to require "horizontal" cooperation among distributors. Section 1333.29(B).[31] The "proprietor," by virtue of his "proprietary interest" is thereby enabled to keep fair traded goods only within the grasp of those who will agree to observe the resale price.

The "horizontal" cooperative efforts authorized by Section 1333.29(B) frustrate the aims and objectives of the framers of the Miller-Tydings and McGuire Acts which authorize only *vertical* resale price-fixing.[32]

(Continued from preceding page)

lished by him, or his sole distributor specifically authorized for that purpose, and no such cooperation shall constitute an unreasonable or unlawful contract or combination in restraint of trade." *Hearings on H. R. 10527, (Harris Bill) etc.*, (1958), Eighty-fifth Congress, Second Session, at 5. The second Harris Bill narrowly interpreted the ruling of this Court in *McKesson*. H. Rep. No. 467, Eighty-sixth Cong., First Sess. (1959) 19.

[31] Section 1333.29 provides in part:

"(B) Any such *contract or notice* may contain the following provisions:

(2) That the *buyer* will require from any distributor to whom he may resell such commodity an agreement that such *distributor will not, in turn, resell such commodity at less than the minimum resale price stipulated by the proprietor thereof for the level of distribution at which such distributor resells and that such distributor, if he resells to another distributor, will make the same agreement with the distributor to whom he may resell;*

(3) That the *seller* will require from any other distributor to whom he may sell other items of such commodity an agreement that *such distributor will not, in turn, resell such commodity at less than the minimum resale price stipulated by the proprietor for the level of distribution at which such distributor resells and that such distributor, if he resells to another distributor, will make the same agreement with the distributor to whom he may resell.*" (Italics added.)

[32] *E.g.*, 98 Cong. Rec. 8870, Eighty-second Cong., Second Session (1952) (Humphrey); H. Rep. No. 1437, Eighty-second Congress, Second Session (1952) at 3.

The Ohio law also frustrates the aims and objectives of the antitrust laws announced by this Court —that combinations and boycotts which seek to create, maintain or extend price-fixing, with or without benefit of "fair trade," are unlawful under Section 1 of the Sherman Act. *United States v. Bausch and Lomb Co.*, 321 U. S. 707 (1941); *United States v. Frankfort Distilleries, Inc.*, 324 U. S. 293 (1945); *United States v. Parke, Davis and Co.*, 365 U. S. 125 (1961).

4. The rule of the "Masters Mail Order Co. of
7 Washington" cases was sought to be overcome by the *national fair trade* provisions of the MacLachlan proposals and the Harris Bill. All persons with notice, anywhere in the United States would be required to maintain resale prices. House Rep. No. 467, Eighty-sixth Congress, First Sess. (June 9, 1959) at 6-7, 16, 19; MacLachlan, *supra*, 11 Vanderbilt L. Rev. 149, 153.

By the express terms of the Ohio legislation (Sec. 1333.29(B)(1), (2)), the proprietor may thwart the shipment of merchandise from Ohio into the hands of "discounters" inside or outside the State of Ohio. Hence, the interstate "diverter" problem of "fair-traded" merchandise is also sought to be met by the 1959 Ohio law.

The aim of the Ohio legislation, taken almost verbatim from the "purpose clause" of the 1959 version of the Harris Bill, is further clarified by the recital of the legislative policy in Section 1333.27(B):

> "Where fair, equitable, and competitive prices cannot be maintained *in all appropriate stages in the distribution of such identified merchandise*, the marketing of such merchandise is depressed and the quantity there-

of moving in the channels of commerce in the state declines." (Italics added.)

The objective of the 1959 law is to "organize the market" for the sale of goods in the course of commerce. The vehicle is the retained "proprietary interest." The Ohio Fair Trade Law authorizes the unlawful "organization of the market" at all levels of distribution by state authorized boycott, by unlawful horizontal price fixing and by the attempted binding of third persons by notice. A single unitary statutory scheme is contemplated, which is reflected in the provisions of the Ohio law.

III. The legislative history of the Ohio Fair Trade Law is devoid of any attempt to reconcile the statute with the federal fair trade enabling or other legislation.

The record of the legislative hearings before the House Judiciary Committee and the Senate Judiciary Committee of the Ohio Legislature is devoid of any attempt to reconcile the 1959 Fair Trade Law with the limitations of the Miller-Tydings or the McGuire Acts, or any other federal enactment bearing upon the Ohio law.

It would seem clear that the 1959 Ohio Fair Trade Law was never considered in terms of the limitations arising out of the antitrust laws of the United States. Section 1333.29(A) authorizes resale price maintenance in violation of Section 5(a)(5) of the McGuire Act and the ruling by this Court in *United States v. McKesson and Robbins, Inc.*, 351 U. S. 305 (1956). By Section 1333.29(B), horizontal agreements are authorized between distributors, rather than simply "vertical" arrangements between a manufacturer, wholesaler and retailer.

There are few comments upon Section 1333.29(A) and (B). The principal spokesman for the Act, stated

"Section 29 authorizes contracts of the kind herein contemplated. Sub-section B provides certain additional things which are those things specifically authorized under the McGuire Act which may be included in any written contract.

Sub-section C states explicitly what I think would be implicit in this law, namely that any distributor who is himself bound by a contract with the proprietor is also a third party beneficiary of the contracts between that proprietor and other distributors of the same commodity." (R. 212; also R. 296)

The explanation for the retention by a "proprietor" of "proprietary interest" pursuant to Section 1333.31 is explained as a mere acknowledgment of "the commercial fact of life" (R. 213; also R. 297). Any relationship between this provision and the Lanham Act (15 U. S. C. Sec. 1051 *et seq.*) was not discussed.

With reference to the defense established by Section 1333.33 (D) arising from the removal of the trademark, no legislative consideration was given to the possible import of the Federal Food, Drug and Cosmetic Act, 21 U. S. C. §§ 301, *et seq.* The legislative proceedings state:

"In other words, the distributor is only bound if he wants to cash in on the proprietor's good will, but he can't have his cake and eat it, too." (R. 214; also R. 297.)

The provision of Section 1333.29(A) authorizing a wholesaling manufacturer to set fair trade prices with his competing wholesalers is explained additionally as follows:

"Mr. Gorrell: I can say that very simply. That is to say that a manufacturer—let's say that he wears two hats. He manufactures some products but is also in the wholesale business. He can still fair trade his manufactured product at a fair trade price so long as he doesn't give his own wholesalers any advantages as a result of doing it.

I would say that the reason for that provision, right now—

Mr. Reno: I can't figure it out.

Mr. Gorrell: It says a proprietor may establish minimum resale prices for his wholesale distributor, not with advantage—and so forth—even though he sells such commodity to retailers in competition with distributors. It takes care of the man who sells direct or the man who is both a manufacturer and wholesaler." (R. 224.)

It would seem clear that the Supremacy Clause of the Constitution, the federal enabling statutes and any other applicable federal legislation were not seriously considered by the Legislature when the 1959 Fair Trade Act was under advisement.

IV. The attempt to bind third persons like appellant, who never bought merchandise from the proprietor by the "contract by notice" provisions of the Ohio law, exceeds any permissible limits of federal enabling legislation.

A. The conception of a "contract" disclosed by the Ohio legislative history is remote from any usual understanding of the term.

Section 5(a) (2) of the McGuire Act provides:

"(2) Nothing contained in this Act or in any of the Antitrust Acts shall render unlawful any *contracts or agreements* prescribing minimum or stipulated prices, or requiring a vendee to enter into *contracts or agreements* prescribing minimum or stipulated prices, for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is free and open competition with commodities of the same general class produced or distributed by others, when *contracts or*

agreements of that description are lawful as applied to intrastate transactions under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale." (Italics added.)

In the views of informed advocates of fair trade, the federal enabling legislation and the state laws, "speak of 'contract' and hence a 'contract' is essential to enforcement of the minimum resale price." The admonition of the *Bausch and Lomb* case, 321 U. S. at 721 has been stressed, along with the further admonition that where the Congress and the Legislatures chose the device of a "contract * * * in determining whether the manufacturer has moved along the right route, it is wise to see whether the manufacturer has actually made a contract." National Wholesale Druggists' Association, *The Basis and Development of Fair Trade*, (3rd Ed., 1955) 32, 91, 92.[33]

In enacting the 1959 Fair Trade Law, the Legislature of Ohio and the sponsors of the statute began with the premise that a lawful fair trade act in the State of Ohio would require a "contract" as a prerequisite to binding any person to observe resale price maintenance. The spokesman for the legislation stated in the House Judiciary Committee of the Ohio Legislature (R. 209) with reference to the decision of the Ohio Supreme Court in the *Bargain Fair* case, 167 Ohio St. 181, 147 N. E. 2d 481 (1958):

"Although it is a little difficult to decide from the opinion what the Supreme Court had in mind, it ap-

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[33] John W. Anderson, President, American Fair Trade Counsel, Inc. in the *Hearings Before the Senate Subcommittee on Retailing, Distribution and Fair Trade Practices* of the Small Business Committee (1958), *Competitive Impact of Discount House Operations on Small Business* at page 316 referred to "* * * the somewhat *cumbersome contract system of fair trade.* * * *"

parently objected to a person being bound by the provisions of a contract to which he had in no way been a party. *The Court in no way cast any doubt as to the validity and enforceability of a contract between a producer and a distributor providing minimum prices if the distributor was a party to that.*

"Does House Bill 318 answer the Court's constitutional objection? We think it does." (R. 209) (Italics added.)

The approach adopted in the 1959 legislation does not approach the conception of "contract or agreement." The principal spokesman for the legislation admitted that the statutory provisions made it "pretty hard to find any kind of a contractual relationship." The following colloquy took place:

"Mr. Rudd: Would this be on any stronger ground if instead of implying a contract between the retailer and the manufacturer or proprietor of the trade name, if you implied a contract between the retailer and the one from whom he bought the merchandise for the benefit of the proprietor, a third party beneficiary contract? There you would have escaped, perhaps, from the privity. * * * You have set up a contract between the retailer and someone with whom he has no contractual relationship.

Mr. Gorrell: The reason we have done that, and I recognize it. If we had drafted the legislation in that way, we would have gotten around the problem of the privity of contract, maybe, but the feeling of those who worked on that is this: Then you would be clearly having a—let's suppose that the retailer buys it from a wholesaler, neither one of whom have said anything at all about the stipulated price.

It is pretty hard to find any kind of a contractual relationship. It seems to me that we would have to face up to the privity of contract in order to go back to the man who was going to establish that price. Otherwise there might be an agreement between two

people who never said anything about establishing price," (R. 268-269.) (Italics added.)

The absence of "privity of contract" impelled the framers of the Ohio statute to attempt to formulate an "implied contract." The "implied contract" revolves about the conception of a "proprietary interest" retained by the trade-mark owner pursuant to Section 1333.31. The prevailing opinion of the Supreme Court held:

> "It is the intention of the new act to declare and protect the proprietary interest of a manufacturer in his trade-mark and the goodwill attached to it * * *. The means employed by the act is the long and well established legal doctrine of implied contract * * *." (R. 423-424.)

In Gorrell and Brown, *A Reexamination of Fair Trade Legislation in the Context of the New Ohio Fair Trade Act and the Decision in Hudson Distribs., Inc. v. Upjohn Co.* (1963), 15 Western Reserve L. Rev. 84, at 95, the "contract by notice," is analogized to an implied contract arising out of the acquisition of a piece of property;[34] *e. g.*, a candy bar (R. 418), or an apple.

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[34] "The Legislature found that the only difference between the 'consent' and 'in fact' situations is that in the former, a written contract between the parties exists, while in the latter, a contract arises by reason of the acts of the parties. The Legislature further recognized that nothing new or novel occurs in the establishment of a contract arising out of their acts between certain parties.

"If a person owns a piece of property, for example an apple, he may enter into an agreement with another person to sell that apple for five cents. A binding contract arises and the purchaser is obligated to pay the seller five cents. The seller also may place a sign on his apple saying, 'For Sale—5 cents.' If another person then comes along, reads the notice, and takes and eats the apple, he is equally obligated to pay the seller five cents. This result follows even if the apple eater says to himself while munching the apple, 'I intend to pay only three cents.' *The principle is the same whether the property interest transferred is an apple, a house, an exclusive franchise or license, or a trade-mark or trade name.*" (Italics added.)

The difficulties created by the absence of any "privity" of contract or consensual relationship between Upjohn and Hudson were also resolved by reference to the doctrine of "implied warranty."[35]

In sum, the legislative history of the 1959 Fair Trade Law discloses:

> (1) It is "pretty hard" to find a "contractual relationship" in a case like that at bar, that is, where Hudson bought from a third party who, so far as Upjohn knows, never said anything about the price;
>
> (2) The statutory "implied contract" arises from a "proprietary interest" reserved to the "pro-

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[35] E.g., R. 226; also R. 265-266, where the following appears:

"Chairman McGovern: I wonder if in all those instances there isn't a real distinction to be made in the cases where we are talking about the bulk sales law, conditional sales law, if we are not dealing with cases where implied terms are read into a contract that is voluntarily entered into by parties, wherein this proposed law, we are implying the contract itself. There is no contract set by—exempt by implication, regardless of terms.

Mr. Gorrell: I would submit, Miss McGovern, when anybody buys goods, there is a contract, even though it is just a unilateral contract, where they take the goods and pay for them, there is a contractual relationship. We are saying that a part of that contractual relationship is a part of this condition.

I think it is a contract, very simple one. If I go in the store and hand the man a dollar and say, 'Give me the piece of goods,' and he gives it to me, granted it is a contract that is executed right away, but I would think it is a contract.

Chairman McGovern: Very important to this is the remaining question of privity where you are buying this piece of goods at the end of the line and where somebody up at the end of the line has put a trademark on it, the manufacturer.

Mr. Gorrell: I agree.

I think our answer to that has to be that this recent line of cases which our Ohio Supreme Court has joined in the crowd moving that way in saying that privity of contract when you are dealing with anything where there has been publication, in effect, to the public as to what they are buying, the privity of contract is archaic and won't stand in the way of there being a contractual relationship, as in implied warranties." (Italics added.)

prietor" by the Legislature of the State of Ohio upon goods in commerce;

(3) By notice of the establishment of prices, a contract arises *in the sense of the doctrine of "implied warranties."*

It follows from the foregoing that in the absence of any "proprietary interest" retained on goods in commerce, in the sense of a piece of tangible property, there would be no "implied contract." The doctrine of "implied warranties" does not *create* a contract, since it is merely a doctrine for facilitating the recovery of damages by an injured tort claimant. *Rogers v. Toni Co.*, 167 O. S. 244, 147 N. E. 2d 612 (1958); Skeel, *Advertised Products Liability* (1959) 8 Cleveland Marshall Law Review 2, at 5.

B. An amendment to the federal enabling legislation is required to give validity to a "notice contract."

Both the House Report on the Harris Bill and the Hearings recognized that specific permission was required before a "contract by notice" affecting commodities in interstate commerce might be valid. H. R. 1253, Eighty-sixth Cong., First Session proposed specifically the amendment of Paragraphs 5(a)(2), (3), and (4) to add a reference to "notice" in the provisions referring to contracts and agreements.

H. Rep. No. 467, Eighty-sixth Cong., First Session stated at page 18:

"The only change proposed in paragraphs (2) (3) and (4) is to add a reference to 'notices' in the provisions referring to contracts and agreements. This change is made so that where a State law permits a manufacturer to establish a stipulated or minimum resale price by the giving of notice, the McGuire Act provisions will apply to the same extent that they now do in the case of State laws which permit the estab-

> lishment of such prices by contracts or agreements between manufacturers and their distributors. The committee has been informed that Virginia has modified its Fair Trade Act so as to permit the establishment of stipulated or minimum prices by notice."

The proponents of the Harris Bill also recognized the desirability of amendment in view of the Virginia legislation and similar contemplated legislation by other states. E.g., Testimony of Herman S. Waller, Counsel, National Association of Retail Druggists, *Hearings on H. R. 10572, etc.*, Eighty-fifth Cong., Second Session, pp. 478, 577.

The legislative history of the McGuire Act consistently refers to "signers" and "nonsigners" of "contracts and agreements." Under the Ohio law, there are now only "contractors." There are no longer "signers" and "nonsigners."

For purposes of fair trade, the mere giving of a notice does not create a "contract." It has accordingly been held in Ohio "that the provision of the 1959 Ohio Act requiring *no* 'contracts or agreements' within the purview of the Miller-Tydings Act or the McGuire Act, would not fall within the scope of such acts and any minimum resale prices established without such 'contracts or agreements' would be in violation of the Sherman Act." *Bulova Watch Co., Inc. vs. Ontario Stores of Columbus, Inc.*, 86 O. L. Abs. 585, 599, 176 N. E. 2d 527, 535 (1961), *aff'd without opinion*, Ct. of App. for Franklin County, June 19, 1962. The result in the *Bulova Watch* case is clearly correct. *Cf.* Derenberg, *Trade Regulation*, N. Y. U. 1958 Annual Survey of American Law, 189; Weston, *Fair Trade, Alias "Quality Stablilization": Status, Problems and Prospects*, 22 ABA Antitrust Section, Vertical Arrangements 76, 92-93 (1963). In discussing the requisites of a "contract," The Basis and Development of Fair Trade (3d Ed., 1955),

published by the National Wholesale Druggists' Association states (32-33):

> "mere notice without such assent will not do. Assent to fair trade prices and agreement to observe them will not be implied from a legend upon an invoice which accompanies the goods and the retention of the goods by the buyer."

Hoffman-La Roche, Inc. v. Weissbard, 19 N. J. Super., 210, 88 A. 2d 238 (1952), *affirmed* 11 N. J. 541, 95 A. 2d 398 (1953); *Johnson & Johnson v. Charmley Drug Co.,* 11 N. J. 526, 95 A. 2d 391 (1953).

C. The Virginia Courts have declined to give effect to a "notice contract" under the circumstances of this case.

The Virginia Courts, including the Supreme Court of Virginia, have construed the 1958 Virginia Fair Trade Law as not binding upon a third person who does not acquire the merchandise directly from the "proprietor."

In *Bulova Watch Co., Inc. v. Zale-Norfolk, Inc.* (Number 2570, Court of Law and Chancery in the City of Norfolk)[36] Bulova sold merchandise directly to the defendant until the end of 1960. In the spring of 1961, Bulova mailed a minimum retail price list to the respondent. At the trial, Bulova offered in evidence a fair trade agreement dated November 8, 1960, with another retailer. Defendant admittedly sold complainant's commodity below the minimum retail price set forth in the price list mailed by complainant.

The Court found as a fact "that the evidence shows that the respondent had actual notice of the minimum retail price of complainant's commodity which constituted an offer"; and that respondent, Zale-Norfolk, Inc., obtained Bulova watches from a source other than

[36] Certified copy of Opinion reprinted in full in Appendix B hereto.

the complainant. Over plaintiff's objection the Court declined to receive evidence as to defendant's exact source of the goods, other than that it had not purchased directly from Bulova.

In denying relief to Bulova, the Court held:

> "In the latter case (*Standard Drug v. General Electric*), General Electric shipped its commodity bearing its trade mark to Standard Drug at a time when the latter had in its possession a list of the fair trade minimum retail prices. In the instant case, the court is of the opinion that the evidence shows that the respondent had actual notice of the minimum retail prices of the complainant's commodity which constituted an offer. *However, the respondent obtained the complainant's commodity from a source other than the complainant.*
>
> "The court is of the further opinion that *the receipt of the commodity from a source other than the manufacturer cannot be deemed an acceptance by the respondent, for the respondent was not a party to the agreement or in privity with either of the parties, and the Fair Trade Act is limited to voluntary agreements. To hold otherwise would be to write into the law that which has been removed from it, to-wit: the 'nonsigner' provision.*" (Italics supplied.)

The Supreme Court of Virginia denied review on March 1, 1962.[37]

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[37] Appendix B, pp. 101-102, *infra*:

"The petition of Bulova Watch Company, Inc., a New York corporation, for an appeal from a decree entered by the Court of Law and Chancery of the City of Norfolk on the 7th day of September, 1961, in a certain chancery cause then therein depending, wherein the said petitioner was plaintiff and Zale-Norfolk, Inc., t/a Zale's Jewelers, was defendant, *having been maturely considered and a transcript of the record of the decree aforesaid seen and inspected, the court being of opinion that the said decree is plainly right,* doth reject said petition, and refuse said appeal, the effect of which is to affirm the decree of the said Court of Law and Chancery." (Italics supplied.)

The Virginia courts have confined the ruling in *Standard Drug* to its proper facts—the direct sale of merchandise from the fair trader to the defendant *under circumstances where defendant's consent to the fair trading might possibly be inferred.*[38]

The Virginia holding does not accord with the general law. A notice does not create a "contract or agreement" within the meaning of the federal enabling legislation:

> "Mere notice without such assent will not do. Assent to fair trade prices and agreement to observe them will not be implied from a legend upon an invoice which accompanies the goods and the retention of the goods by the buyer."
>
> The National Wholesale 'Druggists' Association, *The Basis and Development of Fair Trade* (3rd Ed., 1955) pp. 32-33.

At common law, a third person with notice of a resale price maintenance agreement between two others would not be bound by "notice" of the contracts. The Massachusetts Supreme Court held that, even though a manufacturer of a drug invariably sold it under a contract that the purchaser would observe a minimum resale price, a "nonsigner" retailer who in some way had obtained a

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[38] The limitation inherent in the Virginia Fair Trade Act was recognized by the Brief of the General Electric Company in *Standard Drug Company, Inc. v. General Electric Company*, 202 Va. 367, 117 S. E. 2d 289 (1960), *app. dism.*, 368 U. S. 4 (1961) at 34.

> "Here, we repeat that in this case we are not concerned with a retailer who may have acquired the commodity without notice of the restriction, or even one who acquired the commodity from an intermediary. We are dealing with a retailer in direct privity with the manufacturer, one who bought *directly* from the manufacturer and one who admits *actual* notice (not simple notice by way of a statement attached to the container, but notice by letter) * * *."

quantity of the product could not be restrained from cutting the price. *Garst v. Hall & Lyon Co.*, 179 Mass. 588, 61 N. E. 219 (1901).

V. The Ohio Legislature has exceeded any permissible limits of state power (a) in attempting to separate the trade-mark from the commodity in the course of interstate commerce, and (b) in impliedly authorizing the removal of labels from drugs in commerce.

A. The State of Ohio has sought to introduce a new concept of trade-mark law.

In comments both upon the Harris Bill and the "Quality Stabilization" Bills, the Department of Justice, the Federal Trade Commission, and other agencies of Government have expressed concern at the revolution proposed to be effected in our property concepts.[42] The theory of the Harris Bill, incorporated into the Ohio law, was that a "proprietary interest" was to be retained by the proprietor in the *fair-traded commodity*. The theory of the later Quality Stabilization Bills is that the owner of the brand, name or trade-mark is to retain an interest in the *brand, name or mark* itself, as the commodity wends its way through successive channels of commerce.

What has been proposed by these Bills to be accomplished by Act of Congress under the "commerce clause," the State of Ohio has attempted to accomplish by Act of the Legislature.

The contention that a trade-mark might have an existence independent from the good will of the business to

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[42] H. Rep. No. 467, Eighty-sixth Cong., First Sess. (1959) on H. R. 1253 ("Harris Bill") 25-30; H. Rep. No. 566, Eighty-eighth Cong., First Sess. (1963) on H. R. 3669 ("Quality Stabilization") 17-28.

which it appertains or the commodity to which it is applied had been made in litigations in which the Sunbeam Corporation asserted that a tort had been committed by the sale of its products below the manufacturer's stipulated price. This contention has been summarily and uniformly rejected. *Sunbeam Corp. v. Wentling*, 192 F. 2d 7 (C. A. 3, 1951); *Sunbeam Corp. v. Pay Less Drug Stores*, 113 F. Supp. 31 (N. D., Calif., 1953).

The most ardent advocates of fair trade have been unable to find any basis in law for the kind of "proprietary interest" attempted to be reserved by a proprietor upon commodities in interstate commerce. In the 1959 Congressional Hearings (*Hearings on H. R. 768, etc.*, H. Rep., Eighty-sixth Cong., First Sess.) John W. Anderson, President, American Fair Trade Association, and President, Quality Brands Association of America, Inc. refused to endorse the Harris Bill (653-654). Said Mr. Anderson:

> "I want you to note carefully in the Harris bill one thing. I will go no further. *That is that the Harris bill endeavors to establish a hitherto undreamed of proprietary interest of the manufacturer in the product itself, continuing after its sale and delivery and through the various steps of distribution. We have sought diligently, but have found absolutely no basis in established law for that concept.* We found nothing to indicate which way Federal courts would move when asked to support this novel concept of law."

The Lanham Act, 15 U. S. C., Section 1127 has made clear the intention that the subject of trade-marks in commerce has been pre-empted by the Congress.

The section states in part:

> "The intent of this chapter is to regulate commerce within the control of Congress by making actionable the deceptive and misleading use of marks in such

commerce; to protect registered marks used in such commerce from interference by State, or territorial legislation; * * *"

It has been held that the Lanham Act manifests a Congressional intent to pre-empt the field of fair trade-marks in commerce. In *Time, Inc. v. T. I. M. E. Inc.*, 123 F. Supp. 446 (S. D., Calif., 1954) the Court stated at page 452:

> "Nor is there any room to view state law as complementary to the Lanham Act in the face of undoubted Congressional intent to occupy completely a field to the full extent constitutionally permissible. Cf. Missouri Pacific R. Co. v. Porter, 1927, 273 U. S. 341, 345-346, 47 S. Ct. 383, 71 L. Ed. 672; McDermott v. Wisconsin, 1913, 228 U. S. 115, 132-133, 33 S. Ct. 431, 57 L. Ed. 754."

Accord: Diggins, *Federal and State Regulation of Trade-Marks* (1949), 14 Law and Contemporary Problems 200, esp. 206-207, 213-215, 219.

The legislative history of the McGuire Act does not warrant the interpretation that either the McGuire Act or the Lanham Act was to operate as a source of new and independent authority to the states for the transformation of a trade-mark into *an entity separated from either the good will of the business or as affixed to the commodity so that the "proprietary interest" would thereby achieve a separate status of an apple, a candy bar, or any other piece of tangible property.*

This Court has held in *United States v. Univis Lens Co.*, 316 U. S. 241, at 250 (1942), that a patentee could not control the alienability of his commodity after he had sold it:

> "* * * his monopoly remains so long as he retains ownership of the patented article but the sale of it ex-

hausts the monopoly in that article and the patentee may not thereafter, by virtue of his patent control the use or disposition of that article." (Citing authorities.)

Ethyl Gasoline Corp. v. United States, 309 U. S. 436 (1940).

As for owners of trade-marks *a fortiori* they cannot do what is forbidden to a patentee. *United States v. Bausch & Lomb Co.*, 321 U. S. 707, 721 (1944); Handler, *Trade-Marks and Antitrust Laws*, (1948) 37 Trade Mark Reporter 387, 397-399.

The bill enacted by the Legislature of Ohio would repeal the established law of copyrights and patents. Price fixing powers which this Court has denied to holders of patents and copyrights, the State of Ohio would confer upon holders of trade marks and trade names.

The Lanham Act has made perfectly plain that its purpose was to eliminate and avoid such interference by the states with the rights in trade-marks declared by the Congress.

B. The State of Ohio has Impliedly Authorized the Tortious and Unlawful Removal of Labels From Drugs in Commerce.

The retailer's obliteration of Upjohn's trade-marks would be tortious and unlawful. The suggestion of Section 1333.33 (D)[39] that the retailer may achieve a "full" vesting

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[39] "Sec. 1333.33. It shall be a defense to an alleged violation of section 1333.32 of the Revised Code, for a distributor to prove that a commodity has been advertised, offered for sale, or sold:

* * * * *

(D) After the distributor has removed from such commodity all trace of the proprietor's identifying trade-mark or trade name and that in such sale or offer to sell or advertisement for sale no statement, representation, or suggestion of any kind is made which would identify such commodity with the trade-mark or trade-name of the proprietor."

of title in the commodity by obliterating the trade-mark is fairly impossible of achievement. The retailer will have committed the tort of unfair competition and also be in violation of federal and state drug laws forbidding the obliteration or concealment of trade-marks.

Circuit Judge Goodrich in *Sunbeam Corporation v. Wentling*, 192 F. 2d 7, at 8 (1951), showed how the obliterator of trade-marks who "passed off" Upjohn's goods as his own would find himself in serious trouble as a tort-feasor.

Said the Court:

> "* * * Sunbeam says that if Wentling wants to sell its razors below the established price he should take off the identifying trade-mark. Suppose he did. He certainly could not put on his own mark and sell Sunbeam razors as his, Wentling's. And if he sold them with no mark at all but just as 'good electric razors' could not Sunbeam, on the very argument it makes here, complain that Wentling was interfering with its trade-mark by not allowing the customer to know that the good razor which he buys from Wentling is in fact made by Sunbeam? If Sunbeam's argument made to us is sound, we do not see why the other conclusion would not follow. * * * "

The Federal Food, Drug, and Cosmetic Act prohibits (21 U. S. C., Section 331(b)) the "misbranding of any food, drug, device, or cosmetic in interstate commerce."

21 U. S. C., Section 352(a) defines a drug as misbranded "if its label is false or misleading in any particular"; and by Section 352(b)(1) a drug is misbranded "If in package form unless it bears a label containing (1) the name and place of business of the manufacturer, packer, or distributor;" The laws of Ohio contain the same definitions of "misbranded drugs." O. R. C. Section 3715.64 (A)(1), (2)(a).

The removal of labels on drugs is contrary to the national policy expressed by the provisions of the Federal Food, Drug, and Cosmetic Act, 21 U. S. C. A., Section 331 (k),[40] and may well be criminal. *United States v. Sullivan*, 332 U. S. 689 (1948).

It would seem then that the invitation of the Ohio Legislature to the retailer to misbrand Upjohn drugs as his own, is an invitation to civil and penal liability. The fairly cynical character of a proposal to obliterate trademarks was recognized by the proponents of the first Harris Bill during the Hearing thereon.[41]

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[40] "Sec. 331. The following acts and the causing thereof are prohibited:

(k) The alteration, mutilation, destruction, obliteration, or removal of the whole or any part of the labeling of, or the doing of any other act with respect to, a food, drug, device, or cosmetic, if such act is done while such article is held for sale (whether or not the first sale) after shipment in interstate commerce and results in such article being adulterated or misbranded."

[41] Testimony of Herman Waller, Counsel, National Association Retail Druggists, Hearings before a Sub-Committee of the Committee on Interstate and Foreign Commerce, House of Representatives, 85th Cong., 2d Sess. on H. R. 10527, etc. (Harris Bill) 577:

> "If he does not want to use the trademark of the manufacturer, let him scrub it off and sell it without it. He can do that if he wants to.
>
> *Of course, he may run up against the defacement of trademarks, but that is another story* but that is the purpose of the act, and that is what you are trying to do here, to protect that property right against being abused, abused by retailers who seek that little edge of getting something lower, lower, lower." (Italics added.)

VI. The Upjohn fair trade "notice" to appellant violates Section 1 of the Sherman Act; and was given pursuant to a statute which contemplates "fair trading" at all levels of distribution in violation of Section 1 of the Sherman Act.

(a) A resale price maintenance contract sought to be enforced pursuant to a statute which is beyond the federally authorized scope of the federal fair trade enabling legislation violates Section 1 of the Sherman Act. It will not bind appellant. *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U. S. 384 (1951). *Cf. Esso Standard Oil Company v. Secatore's, Inc.*, 246 F. 2d 17 (C. A. 1st, 1957); *Texas Co. v. DiGaetano*, 39 N. J. 120, 187 A. 2d 721 (1963).

The Ohio statute is wholly beyond the permissible scope of state resale price maintenance legislation in providing a conception of "proprietary interest" which separates the trademark from the commodity. "Notice" of the separated "proprietary interest" is then sought to be made into a contract with appellant.

For these reasons, alone, appellant would not be bound by the "notice contract" sought to be imposed upon it by Upjohn.

(b) In accordance with the contemplation of the Ohio statute, Upjohn has "organized the market" at every level of distribution:

A. *Noncontracting Retailers.* Upjohn has given "notice" to retailers like appellant that it has established minimum or "fair trade" prices for its products (R. 27).

B. *Contracting Retailers.* The contracting retailers have signed contracts drawn by reference to

Section 1333.28(I). The contract recites the retention by Upjohn of an interest in the "good will and public acceptance of the products bearing its trademarks, brands or names * * * so long as commodities bearing its trademarks, brands or names are offered for sale in commerce" (R. 25). Upjohn and the retailer agree that "Retailer may enjoy the benefit of the good will symbolized thereby by referring to said trademarks, brands or names in the promotion of sales of said commodities by Retailer" (R. 25).

C. *Wholesalers.* Upjohn has organized price maintenance at the wholesale level either by notice to wholesalers (R. 95-96), or by *del credere* agency arrangement (R. 105-108). Such arrangements have been made with McKesson and Robbins, Inc., a manufacturer of "proprietary drugs" (R. 184) and also a competing wholesaler of Upjohn in drug sales to pharmacies of Upjohn products (R. 89).

Such arrangements appear to violate both Section 5(a)(5) of the McGuire Act and the principles enunciated in *United States v. Masonite Corp.*, 316 U. S. 265 (1942).

As this Court said (316 U. S. 256 at 279-280):

"* * * when it is clear, as it is in this case, that the marketing systems utilized by means of the del credere agency agreements are those of competitors of the patentee and that the purpose is to fix prices at which the competitors may market the product, the device is without more an enlargement of the limited patent privilege and a violation of the Sherman Act. In such a case the patentee exhausts his limited privilege when he disposes of the product to the del credere agent. He then has, so far as the Sherman Act is concerned, no greater rights to price maintenance than the owner of an unpatented commodity

would have. *Dr. Miles Medical Co. v. John D. Parks & Sons Co.,* 220 U. S. 373, 31 S. Ct. 376, 55 L. Ed. 502."

Upjohn's activities in "organizing the market," accord with the intentions of Professor MacLachlan's proposals and the different variations of the Harris Bill. It would seem obvious that the State of Ohio has attempted to authorize what was contemplated to be enacted as a single unitary piece of legislation on a wholly novel theory in commerce, which only the Congress is competent to enact.

VII. The 1959 Ohio Fair Trade Law accomplishes a deprivation of due process under the Fourteenth Amendment by reason of an uncontrolled and arbitrary delegation of power over the property and business lives of others without any procedural safeguards.

Appellant bought and paid for commodities with the Upjohn trade-marks thereon from a wholesaler in Michigan where the nonsigner clause of the Michigan Fair Trade Act is ineffective. *Shakespeare Co. v. Lippman's Tool Shop Sporting Goods Co.,* 343 Mich. 109, 54 N. W. (2d) 268 (1952). By the law of Ohio, part of Appellant's interest in the Upjohn commodities is transferred to Upjohn despite the intervening sales.

The retention of the "proprietary interest" in the commodity by the "proprietor" is made mandatory by the terms of Section 1333.31 so long as the commodity is identified by the trade-mark or trade name of the "proprietor."[43] The mandatory definition, moreover, encompasses

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[43] Section 1333.31 provides:

"A proprietor *shall* retain a proprietary interest in any commodity with respect to which he is a proprietor after he

(Continued on following page)

every trade name or trade mark of the "proprietor," whether he be a "sham" or "token enforcer" of resale price maintenance[44] or a vigorous enforcer; or whether the trade-mark or trade name be "strong" or "weak" or "misleading" or the subject of pending injunction or cancellation proceedings, etc.

The "proprietary interest" is given life, however, only upon the arbitrary decision of the "proprietor" to "fair trade" the commodity. The "proprietary interest" ceases upon the unilateral decision of the "fair trader" to abandon resale price maintenance.

The proprietor's power of decision upon the retention of a "proprietary interest" is matched by the unilateral power given by the statute to the trade-mark owner over the business life of others. By Section 1333.29 (B) (2) and (3), in his sole unfettered discretion, the "proprietor" can by notice or contract deputize and compel every person in his distribution system to assist in the enforcement of fair trade prices, both inside and outside of

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(Continued from preceding page)

has sold it to distributors, so long as such commodity continues to be identified by his trademark or trade name, by reason of his interest in stimulating demand for such commodity through effective distribution to ultimate consumers and of his interest in continuing protection of the good will associated with his trade-mark or trade name."

Section 1333.28 (G) and (H), defining "trade-mark" and "trade name" provide:

"'Trade-mark' means any word, name, symbol, or device, or any combination thereof, used by a producer or distributor to identify his commodity and distinguish it from that produced or distributed by others.

'Trade name' means personal names, and any word, words, symbol, or symbols, used by producers or distributors to identify their companies, firms, or corporations."

[44] Note: *The Operation of Fair Trade Programs* (1955) 69 Harv. L. Rev., 316, 331-332.

Ohio. The stream of interstate and intrastate commerce at wholesale and retail levels may be effectively dammed up unless resale is effected within lines demarcated by the proprietor, i.e.:

(a) resale by the initial vendee at the fair trade price for his particular level of distribution; and

(b) resale to subsequent vendees who observe fair trade at their respective levels of distribution, and who will in turn require observance by their subsequent vendees.

In *Old Dearborn Distributing Company v. Seagram Distillers Corp.*, 299 U. S. 183 (1936) the statute before this Court permitted only resale price maintenance. This Court held that such a statute does not unlawfully delegate legislative authority, nor does it violate due process.

The Ohio statute goes much further. It gives an arbitrary power to one person to generate property interests in goods bought by another, as well as power to regulate the business life of such other.

Failing to abide by such private regulation, a retailer faces the possibility of litigation from every beneficiary of the notice including (a) the proprietor of the trade-mark, and (b) every other person who has either signed a fair trade contract, or (c) who has been served with a notice which also includes a business restriction. Revised Code, Section 1333.29(B)(3).

The conferring by the State of Ohio of an unrestrained discretion upon "proprietors" over the business life of others in the use of their property, in addition to the control of the resale price, clearly constitutes an unlawful delegation of legislation to private persons without any procedural safeguards or standards whatsoever.

As this Court stated in *Carter v. Carter Coal Co.*, at 298 U. S. 238, 311 (1936):

> "The power conferred upon the majority is, in effect, the power to regulate the affairs of an unwilling minority. This is legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business. The record shows that the conditions of competition differ among the various localities. In some, coal dealers compete among themselves. In other localities, they also compete with the mechanical production of electrical energy and of natural gas. *Some coal producers favor the code; others oppose it; and the record clearly indicates that this diversity of view arises from their conflicting and even antagonistic interests.* The difference between producing coal and regulating its production is, of course, fundamental. The former is a private activity; the latter is necessarily a governmental function, *since, in the very nature of things, one person may not be intrusted with the power to regulate the business of another, and especially of a competitor.* And a statute which attempts to confer such power undertakes an intolerable and unconstitutional interference with personal liberty and private property. The delegation is so clearly arbitrary, and so clearly a denial of rights safeguarded by the due process clause of the Fifth Amendment, that it is unnecessary to do more than refer to decisions of this Court which foreclose the question." (Italics added.)

The history of fair trade shows strong opposition to fair trade legislation from many segments of retail business. Report of the Select Committee on Small Business on "*Fair Trade: The Problem and the Issues,*" H. Rep. No. 1292, Eighty-second Cong., Second Sess. (1952), at 22 to

24; Federal Trade Commission, Report on Resale Price Maintenance (1945) 61. The hearings of the last several years indicate a division of opinion in retailing similar to that of a decade ago.

As in the case at bar, the interest of the fair trading "proprietor" and its retailing friends may be wholly at variance with the interests of those like Hudson, whose prices and business practices are sought to be regulated—to their great detriment.

This Court has recently manifested its concern for securing opportunities of procedural due process where, by private action, grave harm may be inflicted upon others. Cf. *Silver v. New York Stock Exchange*, 373 U. S. 341 (1963). In the last ten years many states have held that their respective state constitutions prohibit such a delegation of legislative authority. Conant, *Resale Price Maintenance: Constitutionality of Nonsigner Clauses* (1961), 109 U. of Penn. L. Rev. 539, 545-553. Where the State of Ohio has delegated to private persons the authority to inflict great harm upon others, without any procedural safeguards and without any standards or opportunity for hearing and adjudication, rights of procedural due process granted by the Fourteenth Amendment would appear to have been violated.

As was held in *Browning v. Hooper*, 269 U. S. 396, 405 (1926):

> "* * * It is essential to due process of law that such owners be given notice and opportunity to be heard on that question where, as here, the district was not created by the Legislature, and there has been no legislative determination that their property will be benefited by the local improvement. Appellants were denied all opportunity to be heard. No officer or tribunal was empowered by the law of the state to hear them, or to consider and determine whether the

road improvements in question would benefit their lands. The act is repugnant to the due process clause of the Fourteenth Amendment."

Accord: Washington ex rel. Seattle Trust Co. v. Roberge, 278 U. S. 116, 122 (1928); *Carter v. Carter Coal Co.*, 298 U. S. 238, 311 (1936); Note, *Delegation of Power to Private Parties*, 37 Colum. L. Rev. 447, 458 (1937); Jaffe, *Law Making by Private Groups*, 51 Harv. L. Rev. 201, 217 (1938).

Since so many courts in recent years have declined to give effect to the reasoning and philosophy of the *Old Dearborn* case, it is suggested that this Court may wish to reconsider its views in that case.

CONCLUSION.

Appellant prays that this Honorable Court, in the exercise of its jurisdiction pursuant to 28 U. S. C., Section 1257(2), reverse the judgment of the Supreme Court of Ohio, and declare, for the reasons herein set forth, that Ohio Rev. Code, Sections 1333.27 through 1333.34 is unconstitutional by reason of conflict with the Supremacy Clause of the Constitution of the United States and violation of the Due Process Clause of the Fourteenth Amendment.

Respectfully submitted,

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APPENDIX A.

CONSTITUTIONAL PROVISIONS INVOLVED.

Article VI, Clause 2—*Supremacy Clause.*

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Amendments, Article XIV, Section 1— *Due Process Clause.*

* * * nor shall any State deprive any person of life, liberty, or property, without due process of law.

STATUTES INVOLVED.

Miller-Tydings Amendment to Sherman Act.

"Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: *Provided,* That nothing herein contained shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trade-mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory,

or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under Section 5, as amended and supplemented, of the Act entitled 'An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes,' approved September 26, 1914: *Provided further,* That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other * * *."

The McGuire Act.

"SEC. 5(a) (1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.

(2) Nothing contained in this Act or in any of the Antitrust Acts shall render unlawful any contracts or agreements prescribing minimum or stipulated prices, or requiring a vendee to enter into contracts or agreements prescribing minimum or stipulated prices, for the resale of a commodity which bears, or the label or container of which bears, the trade-mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions under any statute, law, or public policy now or hereafter in effect in any State,

Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale.

(3) Nothing contained in this Act or in any of the Antitrust Acts shall render unlawful the exercise or the enforcement of any right or right of action created by any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia, which in substance provides that willfully and knowingly advertising, offering for sale, or selling any commodity at less than the price or prices prescribed in such contracts or agreements whether the person so advertising, offering for sale, or selling is or is not a party to such a contract or agreement, is unfair competition and is actionable at the suit of any person damaged thereby.

(4) Neither the making of contracts or agreements as described in paragraph (2) of this subsection, nor the exercise or enforcement of any right or right of action as described in paragraph (3) of this subsection shall constitute an unlawful burden or restraint upon, or interference with, commerce.

(5) Nothing contained in paragraph (2) of this subsection shall make lawful contracts or agreements providing for the establishment or maintenance of minimum or stipulated resale prices on any commodity referred to in paragraph (2) of this subsection, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other."

Ohio Fair Trade Act of 1959.

(Ohio Revised Code Sections 1333.27 through 1333.34.)

Sec. 1333.27. (A) Sections 1333.27 to 1333.34, inclusive, of the Revised Code are enacted in the exercise of the police powers of the state and in pursuance of the power specifically granted the general assembly by the people in Section 2 of Article XIII, Ohio Constitution, to regulate the sale and conveyance of personal property, and the purposes of Sections 1333.27 to 1333.34, inclusive, of the Revised Code, are generally to protect and preserve small business, to safeguard the good will of trade-marks and trade names, to further wholesome competition, to prevent monopoly in the distribution of goods, and to promote the public welfare by securing wider distribution of commodities and an increase in the production thereof, and thereby reducing production and distribution costs, protecting and increasing gainful employment in manufacturing, wholesaling and retailing all for the benefit of the consumer and the well-being of the citizens of the state.

(B) It is the further purpose of Sections 1333.27 to 1333.34, inclusive, of the Revised Code, to promote the distribution in commerce in the state of identified merchandise which is in free and open competition with other articles of the same general class. Where fair, equitable, and competitive prices cannot be maintained in all appropriate stages in the distribution of such identified merchandise, the marketing of such merchandise is depressed and the quantity thereof moving in the channels of commerce in the state declines.

(C) To remove obstructions to the marketing of identified merchandise in commerce which are occasioned by unfair selling practices, it is the policy of the state to

afford distributors of identified merchandise an effective means whereby the sale of such merchandise at all appropriate stages of distribution may be consummated at prices adequate to stimulate distribution and low enough to enable distributors of such identified merchandise to compete effectively with those marketing other goods, who by size and dominance may distribute such goods through their own retail outlets or by franchise or consignment methods, and to satisfy the needs of ultimate consumers.

Sec. 1333.28. As used in Sections 1333.27 to 1333.34, inclusive, of the Revised Code:

(A) "Commodity" means any subject of commerce.

(B) "Producer" means any grower, baker, maker, manufacturer, bottler, packer, converter, processor, or publisher.

(C) "Wholesaler" means any person selling a commodity other than a producer or retailer.

(D) "Retailer" means any person engaged in business selling a commodity to consumers for use.

(E) "Distributor" means any person who acquires a commodity for the purpose of resale.

(F) "Person" means an individual, corporation, partnership, association, joint-stock company, business trust, or any unincorporated organization.

(G) "Trade-mark" means any word, name, symbol, or device, or any combination thereof, used by a producer or distributor to identify his commodity and distinguish it from that produced or distributed by others.

(H) "Trade name" means personal names, and any word, words, symbol, or symbols, used by producers or distributors to identify their companies, firms, or corporations.

(I) "Contract" means any agreement, written or verbal, or arising from the acts of the parties. The establishment by a proprietor of a minimum resale price for any commodity pursuant to the provisions of Section 1333.29 of the Revised Code and the proprietor's permission for a distributor to acquire and use the proprietor's interest in the trade-mark or trade name in reselling the commodity shall constitute a contract and sufficient consideration from the proprietor for a promise by the distributor not to sell such commodity at less than the minimum price established by the proprietor. Any distributor (whether he acquires such commodity directly from the proprietor or otherwise) who, with notice that the proprietor has established a minimum resale price for a commodity, accepts such commodity shall thereby have entered into an agreement with such proprietor not to resell such commodity at less than the minimum price stipulated therefor by such proprietor.

(J) "Notice" means actual notice given by any method provided in Section 1333.30 of the Revised Code, or otherwise established by legally admissible evidence.

(K) "Proprietor" means:

(1) A person who identifies a commodity produced by him by the use of his trade-mark or trade name, unless he has specifically granted to another person sole authority to establish minimum resale prices for such commodity;

(2) A person who identifies a commodity distributed by him by the use of his own trade-mark or trade name;

(3) A person who has been specifically granted by the producer or distributor of a commodity which is identified by the trade-mark or trade name of such producer or distributor the sole authority to establish

minimum resale prices for such commodity in the state.

Sec. 1333.29. (A) It shall be lawful, anything in Sections 1331.01 to 1331.14 of the Revised Code or otherwise provided in the Revised Code to the contrary notwithstanding, for a proprietor to establish and control by notice to distributors or by contract, stipulated minimum resale prices for a commodity of which he is the proprietor and which is in free and open competition with commodities of the same general class produced by others and offered for sale in the same general market area. Such minimum resale prices may be differentiated as to various levels of distribution, provided such differentiations are not otherwise unlawfully discriminatory. Such prices may be changed from time to time by written notice to distributors who acquired such commodity with notice of any established minimum resale price. A proprietor may so establish such minimum resale prices for his wholesale distributors, notwithstanding Section 1333.34 of the Revised Code, even though he sells such commodity to retailers in competition with such wholesale distributors, if such sales to retailers are made at prices not less than those he establishes for such wholesale distributors for comparable sales.

(B) Any such contract or notice may contain the following provisions:

(1) That the buyer will not resell such commodity at less than the minimum resale price stipulated by the proprietor thereof for the level of distribution at which the buyer resells the same;

(2) That the buyer will require from any distributor to whom he may resell such commodity an agreement that such distributor will not, in turn, resell such commodity at less than the minimum resale

price stipulated by the proprietor thereof for the level of distribution at which such distributor resells and that such distributor, if he resells to another distributor, will make the same agreement with the distributor to whom he may resell;

(3) That the seller will require from any other distributor to whom he may sell other items of such commodity an agreement that such distributor will not, in turn, resell such commodity at less than the minimum resale price stipulated by the proprietor; for the level of distribution at which such distributor resells and that such distributor, if he resells to another distributor, will make the same agreement with the distributor to whom he may resell.

(C) Any contract or noti e authorized by and entered into pursuant to any of the provisions of Sections 1333.27 to 1333.34, inclusive, of the Revised Code, shall be for the benefit of the proprietor and any distributor who is bound by a similar contract or notice.

Sec. 1333.30. Actual notice of stipulated minimum resale prices may be given to any person by mail, through advertising, or through notice attached to merchandise, to containers, packages, or dispensers thereof, or on the invoice therefor, or imparted orally. Deposit in the United States mail, with postage prepaid, of a letter properly addressed to a distributor and specifying minimum resale prices established by a proprietor shall constitute prima facie evidence of actual notice to said distributor of such resale prices. The acquisition of or dealing in merchandise clearly marked, or enclosed in containers, packages or dispensers clearly marked, or the invoice for which was clearly marked, with minimum resale prices established by a proprietor shall be conclusive evidence of actual notice of such minimum resale prices. Actual notice may also be otherwise established by legally admissible evi-

dence. A person with actual notice of any applicable minimum resale price is thereby charged with notice that such a price is subject to change.

Sec. 1333.31. A proprietor shall retain a proprietary interest in any commodity with respect to which he is a proprietor after he has sold it to distributors, so long as such commodity continues to be identified by his trade-mark or trade name, by reason of his interest in stimulating demand for such commodity through effective distribution to ultimate consumers and of his interest in continuing protection of the good will associated with his trade-mark or trade name.

Sec. 1333.32. (A) Except as provided in Section 1333.33 of the Revised Code, it shall be unlawful and an act of unfair competition for any distributor with notice that a proprietor has established a stipulated minimum resale price for a commodity of which he is the proprietor or for any distributor who is in contract with a proprietor not to sell a commodity for which such proprietor has established a stipulated minimum resale price, at less than such stipulated minimum resale price to sell, offer to sell, or advertise such a commodity for sale at a price lower than such stipulated minimum resale price. In determining whether the sale or offer to sell or advertisement for sale of any commodity is below the stipulated minimum resale price established by the proprietor for such commodity there shall be deducted from the price at which such commodity is sold, offered for sale, or advertised for sale the value of any article or thing of exchange or extrinsic value or any concession made, whether by the giving of coupons or otherwise, which is given or to be given in connection with such sale or offering to sell and the sale or offering for sale of such commodity with any other commodity for a

single or combined price, or the giving of or offering to give any credit or allowance in excess of the actual market value thereof, or the failure to add any tax occasioned by or upon the sale of such commodity shall also be taken into consideration in determining whether such sale, offer to sell, or advertisement for sale is below the minimum resale price stipulated for such commodity by the proprietor; provided the allowance by a distributor to his customers of trading stamps or other redeemable certificates, when the amount or value of such allowance does not exceed three per cent of such stipulated minimum resale price, where the posted or advertised price of any commodity or commodities is not less than the stipulated minimum resale price thereof, shall not constitute the offering or making of a gift or concession prohibited by this section nor a violation of any of the provisions of Sections 1333.27 to 1333.34, inclusive, of the Revised Code.

(B) Any person suffering or reasonably anticipating damage by reason of a violation of this section may bring suit in any court of competent jurisdiction in the state to

(1) Recover the amount of damages sustained as a result thereof;

(2) Obtain injunctive relief whether or not specific monetary damages are established;

(3) Recover the costs of suit, including reasonable attorney fees, which costs and attorney fees may be recovered whether or not specific monetary damages are established.

(C) It shall be no defense to a prayer for an injunction in any such action that there is an adequate remedy at law.

Sec. 1333.33. It shall be a defense to an alleged violation of Section 1333.32 of the Revised Code, for a distributor to prove that a commodity has been advertised, offered for sale, or sold:

(A) In closing out such distributor's stock of such commodity for the bona fide purpose of discontinuing dealing in such commodity and plain notice of that fact is given to the public; provided, the distributor of such stock shall give to the proprietor of such commodity prompt and reasonable notice in writing of his intention to close out such stock, and an opportunity to purchase such stock of such commodity at the original invoice price;

(B) When the stock of such commodity is altered, secondhand, damaged, defaced, or deteriorated and plain notice of that fact is given to the public in the advertisement and sale thereof, such notice to be conspicuously displayed in all advertisements and affixed to the commodity;

(C) By an officer acting under an order of court;

(D) After the distributor has removed from such commodity all trace of the proprietor's identifying trade-mark or trade name and that in such sale or offer to sell or advertisement for sale no statement, representation, or suggestion of any kind is made which would identify such commodity with the trade-mark or trade name of the proprietor.

Sec. 1333.34. Sections 1333.27 to 1333.34, inclusive, of the Revised Code, shall not, except as otherwise specifically provided in Section 1333.29 of the Revised Code, apply to any contract, agreement, or understanding between or among producers, or between or among distributors, or between or among wholesalers.

APPENDIX B.

Letter Opinion from Judge Walter A. Page, Judge of the Court of Law and Chancery of the City of Norfolk to Counsel in Bulova Watch Company vs. Zale-Norfolk, Inc.

COURT OF LAW AND CHANCERY
OF THE CITY OF NORFOLK
Norfolk, Virginia

August 18, 1961

Mr. John D. Leitch, Jr.
Board of Trade Building
Norfolk, Virginia

Mr. Herman A. Sacks
Sacks, Sacks & Jordan
Bank of Commerce Building
Norfolk, Virginia

Re: Bulova Watch Company, Inc., a New York Corporation v. Zale-Norfolk, Inc., T/A Zale's Jewelers, a Virginia Corporation
File #2570

Gentlemen:

In setting forth the conclusions of the court reached in the above-styled matter, a brief review of the evidence is proper.

The complainant, Bulova Watch Company, Inc., sold to the respondent, Zale-Norfolk, Inc., trading as Zale's Jewelers, until the end of 1960. In the spring of 1961 the complainant sent a minimum retail price list to the respondent by mail. The district manager of the respondent denied knowledge of its receipt. Complainant offered in evidence, over the objection of counsel for the respondent, a fair trade agreement dated November 8, 1960,

between the complainant and Kingoff's of Roanoke, Inc. The respondent does not deny selling the complainant's commodity below the minimum retail prices as set forth in the hereinabove referred-to list.

The complainant contends that in accordance with section 59-8.2(10) the respondent had actual notice and that by acceptance of the commodity from any source, whether the manufacturer, wholesaler or retailer, and the resale of same below the minimum retail prices fixed by the manufacturer, unfair competition resulted in violation of the provisions of The Fair Trade Act of Virginia and prays injunctive relief.

The respondent contends that the contract with Kingoff's is irrelevant and not binding on the respondent; that there was no contract, either expressed or implied, between the parties; and that even if the mailing of the retail price list is deemed an offer which the respondent denies, there was no acceptance by the respondent because the respondent had not received or accepted any commodities from the complainant since 1960.

The court is of the opinion that the contract with Kingoff's is inapplicable in that the respondent was not a party thereto and, therefore, the court is not called upon to pass on the question of whether or not that contract is in accordance with the provisions of The Fair Trade Act, and, more particularly, the provisions of section 59-8.3 (Code, 1950, as amended).

There being no written contract, the question before the court is whether there was a voluntary agreement, that is, an offer and an acceptance. In *Benrus Watch Company v. Kirsch*, 198 Va. 94, the court held that the "non-signer" provision (section 59-7, Code, 1950) of the then Fair Trade Act (Chapter 1, Title 59, Code, 1950) was in conflict with and repealed by section 59-20 and section 59-40,

Code 1950, of the Anti-Monopoly Act. The court found it unnecessary to determine whether the "non-signer" provision then embodied in section 59-7 was unconstitutional.

In *Standard Drug v. General Electric*, 202 Va. 367, the court held that the present Fair Trade Act meets the tests of constitutional validity and that as stated by Mr. Justice Miller at page 375, "by elimination of the 'non-signer' provision and substitution of the provision that permits the voluntary contractual restriction on minimum resale price to be agreed upon by the manufacturer or distributor and retailer, it has removed the chief ground and reason relied upon by courts that have held Fair Trade Acts to be unconstitutional."

The court further held that section 59-8.2(10) (Code, 1950, as amended) defining "contract" must be read with section 59-8.3 (Code, 1950, as amended), and that the notice is the offer to make a contract. At page 379 the court uses the following language:

> "Acceptance of the commodity for resale with notice attached stating its minimum retail price constitutes prima facie evidence of actual notice to the retailer of the imposed minimum resale price; acceptance with actual notice of the minimum resale price is deemed assent to the terms imposed in the notice. Voluntary acceptance of the commodity with actual notice of the imposed minimum retail price creates the contract."

In the latter case General Electric shipped its commodity bearing its trade-mark to Standard Drug at a time when the latter had in its possession a list of the fair trade minimum retail prices. In the instant case, the court is of the opinion that the evidence shows that the respondent had actual notice of the minimum retail prices of the complainant's commodity which constituted an offer. How-

ever, the respondent obtained the complainant's commodity from a source other than the complainant.

The court is of the further opinion that the receipt of the commodity from a source other than the manufacturer cannot be deemed an acceptance by the respondent, for the respondent was not a party to the agreement or in privity with either of the parties, and the Fair Trade Act is limited to voluntary agreements. To hold otherwise would be to write into the law that which has been removed from it, to-wit: the "non-signer" provision.

The court is, therefore, of the opinion that the relief prayed for should be denied.

A decree carrying out the foregoing and noting the exceptions of counsel for the complainant may be presented at the convenience of counsel.

Very truly yours,

/s/ WALTER A. PAGE

Walter A. Page

Judge

WAP: meg

Decree in Bulova Watch Company, Inc. vs. Zale-Norfolk, Inc.

VIRGINIA:

IN THE COURT OF LAW AND CHANCERY
OF THE CITY OF NORFOLK

BULOVA WATCH COMPANY, INC.,
a New York Corporation,
Complainant,
vs.
ZALE-NORFOLK, INC.,
T/A ZALE'S JEWELERS,
a Virginia corporation,
Defendant.

DECREE.

This cause came on this day to be heard upon the Bill of Complaint filed by complainant, the defendant's answers to said Bill of Complaint and upon the evidence taken ore tenus, and was argued by counsel for both parties.

Upon consideration whereof, it appearing to the Court that the complainant manufactures watches, radios and other commodities which bear its trade name, the minimum prices of which commodities for resale is fixed by it; that the defendant has sold, and continues to sell, at retail, watches and other commodities manufactured by the complainant but not purchased by it from the complainant, at prices below the minimum prices fixed for resale by complainant; that there is no contract between the parties, expressed or implied, whereby the defendant agreed to sell at retail any of the commodities so manufactured by complainant at the prices fixed by the latter,

by reason whereof the defendant is not obligated to sell said commodities as manufactured by complainant at the minimum prices fixed by complainant for resale of such commodities.

The Court doth, therefore, ADJUDGE, ORDER and DECREE that the defendant is not obligated to complainant to sell any watches or other commodities manufactured by complainant at the minimum resale price fixed by complainant.

And the Court doth further ADJUDGE, ORDER and DECREE that the complainant is not entitled to the relief prayed for by it in the Bill of Complaint, and that the said Bill of Complaint be, and hereby is, dismissed, to which action of the Court the complainant excepts.

To the Clerk of the Court of Law and Chancery of the City of Norfolk, enter this Decree in vacation 9-7-1961.

WALTER A. PAGE,
Judge.

Certified copy of decree of Supreme Court of Virginia on the petition of Bulova Watch Company vs. Zale-Norfolk, Inc.

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Thursday the 1st day of March, 1962.

The petition of Bulova Watch Company, Inc., a New York corporation, for an appeal from a decree entered by the Court of Law and Chancery of the City of Norfolk on the 7th day of September, 1961, in a certain chancery cause then therein depending, wherein the said petitioner was plaintiff and Zale-Norfolk, Inc., t/a Zale's Jewelers, was defendant, having been maturely considered and a

transcript of the record of the decree aforesaid seen and inspected, the court being of opinion that the said decree is plainly right, doth reject said petition, and refuse said appeal, the effect of which is to affirm the decree of the said Court of Law and Chancery.

A Copy, Teste:

H. G. Turner,
Clerk.

Certification by Clerk of Court of Law and Chancery of the City of Norfolk.

State of Virginia,
City of Norfolk, To-Wit:

I, W. L. Prieur, Jr., Clerk of the Court of Law and Chancery of the said City of Norfolk, and State of Virginia, do hereby certify that the foregoing and annexed opinion of the Court, Decree and Mandate of the Supreme Court of Appeals of Virginia, are true and exact copies of the original taken from the Records of said Court, in the chancery cause of Bulova Watch Co., Inc. v. Zale-Norfolk, Inc. etc.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court, at my office, this 5th day of September A. D., 1962, in the 187th year of the Commonwealth of Virginia.

(Seal)

W. L. Prieur, Jr.,
Clerk.

State of Viginia,
City of Norfolk, To-Wit:

I, Walter A. Page, a Judge of the Court of Law and Chancery of the said City of Norfolk, in the State of Vir-

ginia, do certify that W. L. Prieur, Jr., who hath given the preceding certificate, is Clerk of the said Court, and that his said attestation is in due form.

Given under my hand, this 5th day of September, A. D., 1962.

WALTER A. PAGE,
Judge of the Court of Law and Chancery of the said City of Norfolk.

STATE OF VIRGINIA,
CITY OF NORFOLK, TO-WIT:

I, W. L. Prieur, Jr., Clerk of the said Court of the said City of Norfolk, and State of Virginia, do hereby certify that Hon. Walter A. Page whose genuine signature appears to the Certificate above, is a Judge of the said Court, and that all his official acts as such are entitled to full faith and credit.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court, at my office, this 5th day of September A. D., 1962, in the 187th year of the Commonwealth of Virginia.

W. L. PRIEUR, JR.,
Clerk.

(Seal)

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In the Supreme Court of the United States

OCTOBER TERM, 1963.

Nos. 489 & 490.

HUDSON DISTRIBUTORS, INC.,
Appellant,
v.
THE UPJOHN COMPANY,
Appellee,
and
HUDSON DISTRIBUTORS, INC.,
Appellant,
v.
ELI LILLY AND COMPANY,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF OHIO.

BRIEF AMICUS CURIAE ON BEHALF OF THE OHIO HARDWARE ASSOCIATION, THE CLEVELAND ACADEMY OF PHARMACY, OHIO RETAIL FOOD DEALERS, OHIO ASSOCIATION OF TOBACCO DISTRIBUTORS, OHIO RETAIL JEWELERS ASSOCIATION, THE OHIO STATE PHARMACEUTICAL ASSOCIATION and THE OHIO SMALL BUSINESS COMMITTEE.

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THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—PHONE: 621-5647

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I. INTRODUCTION AND INTEREST OF AMICUS CURIAE.

This brief is presented with the written consent of all the parties to both the above-numbered causes under Rule 42 of the Court which are filed with this Court with this brief. A single brief is presented in both cases because

the only questions raised and considered by the lower courts are substantially the same in both cases. This brief is presented on behalf of a variety of retail associations listed above and the literally thousands of small independent merchants who comprise the membership in these various associations. These same associations presented a brief when this matter was before the Court of Appeals of Cuyahoga County on appeal from the initial Common Pleas Court decision and again before the Supreme Court of Ohio when the case was on appeal from the Court of Appeals of Cuyahoga County. Each of these associations had initially desired to present independent briefs but recognizing the practical problem faced by this already over-burdened Court in being deluged by a plethora of briefs in a case involving the public significance that the instant appeals do, these associations have combined to present their views in one brief to this Court as they did to the court below. (Record references throughout this brief will be referred to in the Upjohn case, No. 489, as RU, p. ----, and in the Lilly case, No. 490, as RL, p. ----.)

It is not the purpose of this brief to discuss in detail all of the various technical niceties which may or may not be presented by the Statements of Jurisdiction by the appellant in these cases, since it is felt that those can and will be handled with great competence by counsel for the two appellees. Rather, the basic function of this brief is conceived as an attempt to relate to the Court, from the standpoint of the small independent retail merchant, the social and economic problems (particularly as those problems involve the plight of the small independent retailers) which were presented to the 103rd General Assembly of the State of Ohio at the time of the enactment of Ohio Revised Code Sections 1333.27 through 1333.34,

the considerations which motivated the Ohio Legislature in adopting those sections—the so-called new Ohio Fair Trade Act—and how the General Assembly of Ohio sought successfully to solve those social and economic problems within the framework of the Federal Constitution and the exemptions granted to the states under the so-called Sherman Antitrust Act, Title 15 U. S. C., Sec. 1 et seq., by the so-called Miller-Tydings Fair Trade Act which is contained in Title 15 U. S. C., Sec. 1, and by the so-called McGuire Fair Trade Act, Title 15 U. S. C., Sec. 45. Presumably, the only matters of concern to this Court are whether the Legislature of Ohio in its solution to those problems *in the context of the facts presented by these particular appeals* in some way ran afoul of either a provision of the United States Constitution or of the Miller-Tydings and McGuire exemptions to the operation of the Sherman Act. It is submitted that such was not the case.

II. STATEMENT.

These cases both represent appeals from the Supreme Court of Ohio sustaining an opinion by the Court of Appeals for the Eighth Appellate District of Ohio upholding the constitutionality of the so-called new Ohio Fair Trade Act on the facts which were before those courts. The entire history of these cases and their exact present posture before this Court is not repeated here as it has been presented with great clarity and precision by counsel for the appellees herein. This brief is presented in support of the appellees' position.

III. QUESTIONS PRESENTED.

1. Are Sections 1333.27 through 1333.34 of the Ohio Revised Code (the new Ohio Fair Trade Act) as applied to the facts of these cases repugnant to any provisions of the United States Constitution?

2. Were those same sections, as applied to these facts, within the permissible ambit afforded to the states by the enabling legislation of the so-called Miller-Tydings and McGuire Acts (Title 15 U. S. C., §§ 1, 45) which provided certain exemptions from the Federal antitrust laws for state fair trade laws?

IV. SUMMARY OF ARGUMENT.

1. The Ohio Legislature enacted its Fair Trade Law in 1959 by overwhelming majorities in both branches of the State Legislature. The Legislature was motivated in large measure by its desire to preserve from unfair acts of competition the independent retail merchants who constitute a tremendously significant part of Ohio's commercial marketplace. The Legislature found on the basis of extensive evidence presented to it that the independent retail merchant was a victim of usage by price discounters of a manufacturer's trademark or trade name as bait in order to draw customers into the store of the discounter.

2. The legal basis upon which the Ohio Legislature acted was its recognition that property rights exist and have for a long time existed in trademarks and trade names and that these property rights remain with the owner thereof even after the commodities with which they are used have passed into the hands of other parties. Thus the Ohio Legislature reasoned that a manufacturer should be permitted to attach conditions on the use of its property rights, provided that sufficient safeguards were

included in the law to protect the interest of the retailer of the commodities with which the trademarks are associated.

3. The Ohio Fair Trade Act operates on the basis of contract principles. A contract under the Ohio law arises by reason of the acts of the parties. This occurs when the owner of a trademark or trade name gives to the retailer notice of the condition on which the retailer may use that trademark or trade name and the retailer then thereafter decides to acquire commodities bearing that trademark or trade name and make use of the trademark or trade name in the sale thereof.

4. The decisions of the Ohio Supreme Court below and the Ohio Court of Appeals below recognize the right of the Legislature to determine the economic questions upon which the Fair Trade Act is predicated and to enact a law based upon principles of contract and in recognition of the property rights existing in a trademark or trade name.

5. The entire spectrum of possible constitutional objections under the Fourteenth Amendment of the United States Constitution were advanced to this Court in the case of *Old Dearborn Distributing Co. v. Seagram Distillers Corp.*, 299 U. S. 183 (1936), and rejected by this Court at that time. There is no reason in law or in fact to alter the analysis of these questions made in the *Old Dearborn* case.

6. The contention that constitutional and unconstitutional provisions are inseparably commingled in the new Ohio Act is essentially a question for resolution by the state courts and, further, fails to recognize the provision of the Ohio Revised Code which expressly states that every part of the Ohio Code is an independent section and that the holding of any one part unconstitutional does not affect any other section or part of the Ohio Code.

7. The Ohio Fair Trade Act permits the owner of a trademark or trade name to establish fair trade prices for products sold with the assistance of his trademark when he enters into a contract to that effect with a retailer in the State of Ohio. Many written contracts were entered into between the appellees herein and various retailers throughout the State of Ohio. The Ohio Fair Trade Act then permits the owner of a trademark or trade name to give notice of the prices thus established to other retailers who will in turn be bound where they acquire the manufacturer's trademarked merchandise with notice of the conditions on the use of the trademark. Accordingly, the Ohio Fair Trade Act falls within the enabling provisions of the Miller-Tydings Amendment and the McGuire Act which permit the states to enact fair trade laws which operate in this fashion.

8. If a retailer decides to avail himself of the opportunity to sell merchandise without the benefit of a manufacturer's trademark or trade name, this constitutes no violation of the Federal Food & Drug Act so long as the retailer identifies the contents of the item being sold and includes his own name on the label. Further, there is no violation of the Lanham Act in such action by a retailer. The Lanham Act, in fact, specifically recognizes the existence of property rights in a trademark or trade name and thus stands in direct contradiction to appellant's contention that no such property right exists.

V. ARGUMENT.

A. What the Ohio Legislature Did and Its Economic Reasons For So Doing.

In order to see the new Ohio Fair Trade Act in its proper context and to appreciate its constitutionality, one must go back to the 103rd Session of the Ohio General Assembly in 1959 to see the problem with which it was presented, the facts which were laid before it, its decision to act and its reasons therefor.

This Court has noted many times that the purposes which impel a state legislature to pass an act are relevant in a consideration of its constitutionality because a court must determine whether they are *clearly unreasonable* purposes. If they are reasonable and also bear a reasonable relation to the ends sought to be met, the Court cannot go beyond that point in determining constitutionality. *Ferguson v. Skrupa*, 372 U. S. 730; *Frost Trucking Co. v. R. R. Com.*, 271 U. S. 583, 600, Holmes, J., dissenting.

The record before this Court (RU, pp. 162-366) contains the transcript of the entire hearings on Ohio House Bill No. 318 which eventually became Ohio Revised Code Sections 1333.27 through 1333.34, the so-called new Ohio Fair Trade Act. These many pages of the transcript of the Hearings before the Legislative Committees of the Ohio General Assembly, which included three lengthy and full-scale hearings before the entire Judiciary Committee of the Ohio House of Representatives (a committee made up entirely of lawyers) and again three lengthy and full-scale hearings before the entire Judiciary Committee of the Senate of the State of Ohio, indicate the extreme thoroughness with which the Ohio Legislature considered the social and economic problems presented by such legislation and

the need for such legislation. Upon such consideration, in Section 1 of the Act or Section 1333.27, Ohio Revised Code, the Legislature spelled out in detail its conclusions as to the social and economic problems to be met by this legislation and the legal basis upon which it was purporting to act. It is perhaps significant that both of these Committees, after such careful and lengthy deliberations, recommended the passage of this Act without a single dissenting vote. The General Assembly then enacted the bill as recommended into law by overwhelming majorities (only four dissenting votes in the House and two in the Senate). After a veto by Governor DiSalle on purely policy grounds, the General Assembly again passed the Act, notwithstanding the objections of the Governor, by a vote of 112 to 6 in the House and 30 to 3 in the Senate.

In passing and repassing this legislation, the General Assembly was largely motivated by the conclusions which its Committees had drawn as to the dangers to the state and the public welfare which were presented by the unrestricted price warfare which was rampant in the State of Ohio following the decision of the Supreme Court of Ohio outlawing the so-called "non-signer" clause of the old Fair Trade Law. *Union Carbide and Carbon Corp. v. Bargain Fair, Inc.*, 167 Ohio St. 182, 147 N. E. 2d 481 (1958). As has been noted, the conclusions drawn as a result of this lengthy study were set forth for the courts and the people in Section 1333.27 of the new law and the reasoning behind these conclusions and the vast amount of evidence and data justifying and supporting them are found in the transcript of the committee hearings which are before this Court.

The test, of course, is *not* whether after a review of this legislative history and the evidence contained therein and the conclusions which the General Assembly of Ohio

drew, the Court would or would not have arrived at the same conclusion as the Legislature did. The visceral and intellectual reaction of the judges to the purpose to be achieved is irrelevant if there is a rational and relevant basis in the action taken and the end to be achieved. If the end to be achieved is a reasonable one within the police powers then the conclusion of the Legislature should be final. It is submitted that it is *impossible* to peruse the legislative record of this legislation and conclude that the General Assembly of Ohio acted capriciously.

Indicative both of the broad base of the support for this legislation and the far-reaching nature of the General Assembly's investigation into this matter is a review of the persons who, in *but one* of the several hearings, appeared and registered their desire to testify on behalf of this legislation. Some 58 people appeared at the hearing on April 22, 1959, ready to testify in support of the then proposed Fair Trade Bill. (RU, pp. 237-240.) Many of these people were not only representing themselves and their own businesses but were also there representing and authorized to speak for groups of like-minded persons in their own communities. The legislature also received and evaluated the testimony of opponents to the new fair trade act.

In addition, on the same day the Committee accepted written statements from representatives of such companies as the International Silver Company, Hamilton Watch, Pyramid Rubber, Schick and Johnson & Johnson. Testimony was offered and given by Mr. Taylor Zettler of the Zettler Hardware Stores of Columbus, Mr. Pete Olmstead representing the Ohio Hardware Association and Mr. Clarence Moses of the Ohio Retail Jewelers' Association. The representation at these Committee Hearings and others blanketed the entire retail economy of the State of Ohio, including the drug, hardware, grocery, glassware, rubber

products, jewelry, construction, appliance, photo and camera, tobacco, variety store and newspaper industries.

Perhaps it would be helpful to consider briefly *why* these persons from such widely diverse fields and lines of retail business (and the very people on behalf of whom this brief is submitted) felt so strongly about the need for this law that they left their businesses and came to Columbus ready to testify before a legislative committee. As has been stated, it is one of the purposes of this brief to explain to the Court, as it appeared to the Legislature, why fair trade is a question of economic survival to many small businessmen in many different lines of business and why, as a matter of public policy, the Ohio Legislature considered that survival important to the economy and welfare of the state. If these small businessmen or any substantial number of them were to be squeezed out of business, the general public might not only be deprived of the convenience and services afforded by the small retailer, who is often located in the customer's own neighborhood, but their extinction would mean an inevitable drift toward monopoly of retail distribution in the hands of a few large retailers. In addition, the vertical integration of some manufacturers into the retail business in order to protect their distribution systems would constitute a threat to the consuming public which monopoly always engenders. And, the Legislature knew that price footballing of branded merchandise would seriously impair the good-will and property rights developed by manufacturers in their trade-marks and trade names.

These were the conclusions which the Legislature reached and they certainly cannot be said to be without rational basis. These conclusions were summarized, *inter alia*, in Section 1333.27 of the Act itself, as follows:

"§ 1333.27 Purpose and policy.

"(A) Sections 1333.27 to 1333.34, inclusive, of the Revised Code are enacted in the exercise of the police powers of the state and in pursuance of the power specifically granted the general assembly by the people in Section 2 of Article XIII, Ohio Constitution, to regulate the sale and conveyance of personal property, and the purposes of sections 1333.27 to 1333.34, inclusive, of the Revised Code, are generally to protect and preserve small business, to safeguard the good will of trade-marks and trade names, to further wholesome competition, to prevent monopoly in the distribution of goods, and to promote the public welfare by securing wider distribution of commodities and an increase in the production thereof, and thereby reducing production and distribution costs, protecting and increasing gainful employment in manufacturing, wholesaling and retailing, all for the benefit of the consumer and the well-being of the citizens of the state.

"(B) It is the further purpose of sections 1333.27 to 1333.34, inclusive, of the Revised Code, to promote the distribution in commerce in the state of identified merchandise which is in free and open competition with other articles of the same general class. Where fair, equitable, and competitive prices cannot be maintained in all appropriate stages in the distribution of such identified merchandise, the marketing of such merchandise is depressed and the quantity thereof moving in the channels of commerce in the state declines.

"(C) To remove obstructions to the marketing of identified merchandise in commerce which are occasioned by unfair selling practices, it is the policy of the state to afford distributors of identified merchandise an effective means whereby the sale of such merchandise at all appropriate stages of distribution may be consummated at prices adequate to stimulate

distribution and low enough to enable distributors of such identified merchandise to compete effectively with those marketing other goods, who by size and dominance may distribute such goods through their own retail outlets or by franchise or consignment methods, and to satisfy the needs of ultimate consumers."

The story of the impact of the practices which the Fair Trade Law is designed to curb on various types of businesses is told in the Committee Hearings before the Ohio General Assembly as well as in the various affidavits of retailers, wholesalers and manufacturers which are also part of the record before this Court in these cases. (The affidavits referred to are in RU, pp. 109-161.) In summary, it is this:

Ohio, because of its geographical composition, has many small and medium-sized towns. In these areas, particularly where industry, commerce and agriculture have been intermixed, the hardware merchant has always provided an important service to his community and has been an active participant in community life. The same is equally true of the neighborhood or suburban hardware dealer in the larger cities of the state. Usually the hardware store owner's compensation, in view of his investment in capital, time and labor, has been relatively modest. The independent hardware retailer in order to serve properly the community in which he operates must carry a wide variety of products, ranging from the traditional hardware items such as nails, tools, etc. to appliances, paint and other consumer items. On many of those items the return is not sufficient to cover the cost of stocking and handling. Therefore, as with most service retailers, the hardware store can only provide these services and still make an overall profit by relying on a normal profit from the sale

of certain trademarked and publicly accepted quality items, such as Sunbeam small appliances, the Corning "Pyrex" line, etc. These items, which are normally fair-traded to permit the retailer a 33⅓% gross profit, are unfortunately ideal "bait" items for the discount operator because of their public acceptance and price identification. These large operators, quite often owned out of the community, use these "bait items" as traffic producers in order to attract customers and sell them off-brand "bargains," or last year's models. They skim the "cream" from the local dealers on their profitable items and eventually make it impossible for them to continue to stock and supply the low-volume convenience items for their customers in the geographical area which they serve. The large discounter will normally stock only the fast-moving, well-known hardware items and will not carry the countless staples which the independent retailer feels obligated to have available. Operating at an overall net profit margin of less than 2% the independent hardware retailer cannot withstand this kind of price-footballing competition.

It is not the purpose of this brief to elaborate at length on the advantages to our economy and political system of preserving the small independent businessmen, such as the hardware dealer, as a part of the fabric of our society. The Legislature concluded that this is important to the general welfare and that the discouragement of monopoly in retailing is vital to the general welfare. Whether or not the Court agrees or disagrees with this conclusion, it cannot be denied that it is at least one *possible* and *logical* conclusion which could be reached. This alone is sufficient to bring this legislation within the ambit of the power and right of the General Assembly to enact in the promotion of the general welfare. It certainly is as proper for the

Legislature to consider the economic climate necessary to protect small business from extinction as it is to concern itself with the minimum wages to protect labor, price supports to support the farmers, and the varieties of other legislation in which the Legislature has been required to make a determination among competing interests and balance those interests to promote the public welfare.

In addition, even a cursory reading of the transcript of the hearings before both the House and Senate of the Ohio Legislature prior to passage of this Act will make clear the Legislature's concern with the threat to the public which the growth of giant retail monopolies brings about and its concern for the protection of the trademarks and trade names of those small and medium sized manufacturers. These manufacturers, through the production of quality goods and the advertising of such goods widely to the public, build up a good will in those trademarks and trade names in which they have a property right quite aside from the commodities themselves which the Legislature felt should be protected against parties who would unscrupulously destroy that good will to their own benefit.

The pattern which we have seen in the retail hardware business as shown by the evidence before the Legislature and by the record in these cases is repeated in a somewhat similar fashion in the photograph and camera equipment business where the independent camera retailer has suffered heavily from the predatory practices of the discount houses.

Sale of photographic equipment and supplies requires a competent and trained retailer, not only from the aspect of repair and service, but from the desirability and necessity of advising the consumer concerning capabilities, use

and care of cameras and photographic equipment. It is essential that the retailer have such training. The large discount house ignores all of this, operating with essentially untrained personnel, using the cameras for their purposes only so long as they continue to attract customers. Photographic equipment and supplies are popular items of merchandise and ideally suited for use by the discount house to attract the consumer who sees himself as securing a bargain. When the consumer needs service, or advice on his equipment, he will return to the shop having the trained independent retailer. This is all fine for the discount house operator, but cannot last, for the independent retailer will not be able to remain in business solely by reason of his service and free advice if he is unable to sell his camera stock-in-trade at a profit. The camera business is also a target for those discounters who lure their customer in by advertising a well-known name and then switch him to a cheaper and unknown brand once he is within their meshes. The affidavits of Benton F. Kauffman and Otto G. Graeff (RU, pp. 122, 159) demonstrate these points.

The retail jewelry business is another obvious target for the deceptive practices of the discounter. In jewelry merchandising, the role of the merchant is extremely important. The authenticity of an item, its quality and the jeweler's reputation are vital to the customer. When the buyer doubts the integrity of the jeweler, he will not transact business with him. Thus, in this trade area, the price warfare, loss-leader practices, sales manipulation, misrepresentations and generally unfair practices accompanying discount operations are devastating. Because a jeweler handles items of merchandise which are unique and which are not fair-traded, the price cutter's opportunity is lucrative. The discounter will lure a customer

into his store by advertising for sale, for example, a fair-traded watch with a known value. The cut-rate jeweler is not anxious to sell this watch but only to attract trade and give the impression of charging generally low prices. Having done this, he may then warrant the list price of a diamond as much as double its true value and offer it for "sale" to the customer at an "alleged" 50% discount. In this way the discounter uses the manufacturer of the watch and the legitimate jeweler who has maintained the manufacturer's price of a name brand watch to create the bait setup whereby the cut-rate jeweler profits on another item.

These practices, as shown by the evidence before the Legislature and the record below, are not illusory. Real dangers are created to the very existence of the small independent retailer and to the public as a whole. The retail drug business has been often cited as one of the leading proponents of fair trade legislation. The reason is fairly simple. Druggists are normally expected to be open long hours, to provide prescription service in their neighborhood areas on a 24-hour basis, to provide delivery and other such services in connection with carrying a wide and complete line of prescription items and health aids. Economically, they can only do this if they have protection on certain well known brands of prescription, proprietary and cosmetic items which the customer expects to get from his drugstore but which he can be lured into buying elsewhere by the claim of a "lower" price. A concrete illustration of how one discounter, who happens to be the appellant in these cases, operates in a way inimicable to the public interest is brought home in the record in Case No. 489. The record shows how a discounter skims the "cream" off the top of the business by refusing to give those services which the public has come to expect

from druggists, such as a full line of prescription items, 24-hour service, etc.

William J. Crable, an employee of the Pinkerton Detective Agency, was given two separate drug prescriptions and instructed to have these filled, first at the appellant's drugstore and then at any drugstore that he might select at random. (RU, p. 148.) At the appellant's store, he presented his prescriptions to a clerk who stated that it would take a little time to fill. About ten minutes later the prescription slips were returned to Crable with a piece of paper attached to each stating "do not have." The clerk explained that they probably did not have the necessary ingredients to fill these prescriptions. Crable then went to three other retailers selected at random, including a store in downtown Cleveland and neighborhood pharmacies, at which locations the prescriptions were readily filled. On a subsequent date, a third prescription was taken to the appellant's store and then to three other random stores with similar results. (RU, p. 149.) That is, the prescriptions were readily filled by the independent pharmacists but were refused in the appellant's store. These prescriptions were examined by local pharmacists who stated that there was nothing unusual about them aside from the fact that they did require a little effort to prepare. (RU, pp. 152, 155, 157, 158.) It is not surprising that a discounter who is operating on a fast-turnover basis would not carry the staff required to render the service needed by the public in connection with the sale of drugs.

This is but one example of the service people have quite properly come to expect from their professional druggists but which the fast-moving discounter, interested only in fast turnover and perhaps his own unknown line of higher profit merchandise, is not able or willing to supply.

As Professor Davidson of the Ohio State University and joint author of a basic text in marketing used in over 200 universities has pointed out in the record in these cases when speaking of the services rendered by the independent retail druggist which will make him so particularly vulnerable to the practice of the giant discount operation (RU, pp. 113-14):

> "The importance of the retailer is further highlighted in the drug field. His retail outlet must be geographically convenient to the consumer. The person seeking to have a prescription filled or to purchase a supply of vitamins does not want to drive five miles to do so. The retail store must be open from early in the morning until late at night. As mentioned above, prescriptions can be filled only by a registered pharmacist. Also the pharmacist renders many services in the sale of drugs that are not limited to prescriptions. They advise consumers as to the nature and potency of drugs, they give warnings when indicated, and furnish advice as to the handling and storage of drug products. It is thus obvious that strong sales support from these retailers can only be expected when they feel they are being fairly treated by the manufacturer."

It is not unreasonable for a state legislature to take the view that the small business in its state merits legislation protecting its competitive position against what the legislature conceives to be the unfair business practices of the giant discounter. Nor does it seem unreasonable for a state legislature to conclude that the use of nationally branded merchandise for the purpose of attracting business away from the small merchant is an unfair practice or that the public is not benefited when it becomes impossible for a person to remain in business and still render service in connection with the sale of merchandise.

The extent and nature of the operations of a giant discounter are typified by the appellant herein. Bernard Shulman, in his affidavit, states that he is the president of the appellant and other corporations which operate drugstores and retail outlets in the Norwood, Cincinnati, Dayton, Columbus, Cleveland and Youngstown areas. (RU, p. 50.) Actually, Mr. Shulman's operations are even wider. (See Federal Trade Commission Docket No. 8576.)

In the decision of the Supreme Court of Ohio below, Judge Griffith sums up the reaction of the Ohio Legislature to the practices and to the public threat created thereby when he says in his own opinion (RU, p. 420):

> "Even to the most casual observer it is readily apparent that the small independent merchant is gradually being forced out of business through the operation of the large merchandising establishments * * *."

With this background in mind and the conclusions the Ohio General Assembly had drawn from the evidence presented to it, i.e., that the small retailer would be driven from business to be supplanted by giant monopolistic discounters, that competition was not being protected by the present cut-throat system but rather that monopoly and oligopoly were being encouraged, and that the legitimate right of manufacturers to protect their property rights in their trademarks and trade names and to contract concerning their use was being destroyed, how did the Ohio Legislature decide to deal with this problem? Was their approach to its solution reasonable and relevant to the end sought to be achieved and within the framework of the Legislature's right to deal with the public evil even though perhaps in so doing it might step on someone's toes?

B. The Legal Basis Upon Which the Ohio Legislature Acted.

The Legislature recognized that branded, trademarked merchandise was the principal tool being used by the discounter to drive the independent merchant from the marketplace. They also recognized that this use by the discounter severely impaired the property rights of the trademark owner in his brand or name. Thus the Legislature reasoned that by recognizing the property in a trade name and by granting a statutory assist to prevent abuses of this property interest, it could accomplish its legislative purposes as set forth in the Act itself.

The property right in a trademark or trade name is not *created* in any fair trade law although the new Act does specifically recognize the existence of this right. The property rights in a trade name or trademark as built up through product good will, advertising and promotion were recognized long prior to, and independently of, fair trade legislation.

A trademark is a visible reputation and it is the reputation which the price cutter uses to get people into his store. This does not belong to him but belongs to the owner of the trademark, which is usually registered by the owner in the United States Patent Office. As Mr. Justice Frankfurter stated in *Mishawaka R. & W. Mfg. Co. v. S. S. Kresge Co.*, 316 U. S. 203, 205 (1942):

> "The protection of trade-marks is the law's recognition of the psychological function of symbols. If it is true that we live by symbols, it is no less true that we purchase goods by them. A trade-mark is a merchandising short-cut which induces a purchaser to select what he wants, or what he has been led to believe he wants. The owner of a mark exploits this human propensity by making every effort to impreg-

nate the atmosphere of the market with the drawing power of a congenial symbol. Whatever the means employed, the aim is the same—to convey through the mark, in the minds of potential customers, the desirability of the commodity upon which it appears. Once this is attained, the trade-mark owner has something of value. If another poaches upon the commercial magnetism of the symbol he has created, the owner can obtain legal redress * * *."

A trademark is an intangible property right which the owner does not part with when he sells the goods to which the mark may be affixed. As this Court said in *Bourjois v. Katzel,* 260 U. S. 689, 692 (1923):

> "* * * Ownership of the goods does not carry the right to sell them with a specific mark * * *."

Trademark protection is peculiarly within the province of the several states since the right to a trademark itself is dependent on state law This proposition has been well established for many years. In *Trade-Mark Cases,* 100 U. S. 82, 93 (1879), Mr. Justice Miller said:

> "* * * the property in trade-marks and the right to their exclusive use rest on the laws of the States, and, like the great body of the rights of person and of property, depend on them for security and protection * * *."

If, as this case holds, a state which creates trademark property may protect it against limitation, why cannot the state equally protect the trademark owner against other acts which impair the value of his trademark and may destroy it? The sale of trademarked goods at cut prices is recognized and has been recognized as an injurious practice by our Legislature as well as by the United States Congress and at least 44 other state legislatures.

Persistent price cutting is as destructive of trademark property as wholesale infringement.

It cannot be doubted that the legislature of a state has the power to pass laws to protect the owners of trademarks or other property against trespass, if the legislation adopted is reasonably designed to accomplish that end and is not arbitrary. Trademarks are property. As Mr. Justice Holmes said in *Beech-Nut Packing Company v. P. Lorillard Company*, 273 U. S. 629, 632 (1927):

> "* * * in a qualified sense the mark is property, protected and alienable, although as with other property its outline is shown only by the law of torts, of which the right is a prophetic summary * * *."

Moreover, a trademark is property of a peculiar, intangible sort. Its value depends upon acceptance by a fickle consuming public. It is difficult to develop and easy to injure. As Mr. Justice Holmes again said in *Bourjois v. Katzel, supra*, at page 692:

> "* * * It deals with a delicate matter that may be of great value but that easily is destroyed, and therefore should be protected with corresponding care * * *."

The protection of trademarks has always been regarded as sound public policy. Mr. Justice Clifford said in *McLean v. Fleming*, 96 U. S. 245, 252 (1877):

> "Everywhere courts of justice proceed upon the ground that a party has a valuable interest in the good-will of his trade, and in the labels or trade-mark which he adopts to enlarge and perpetuate it. Hence it is held that he, as proprietor, is entitled to protection as against one who attempts to deprive him of the benefits resulting from the same, by using his labels and trade-mark without his consent and authority * * *."

An attempt to secure a "free ride" on another's investment in business and reputation is, as we have already seen and the facts of these cases demonstrate, exactly what the discounter or price cutter seeks to accomplish. In so doing, the discounter not only damages the trademark but causes irreparable harm to the small businessman as previously indicated.

The passage of the Sherman Act, 15 U. S. C., Sec. 1, et seq. by the Congress of the United States in 1890, as interpreted by the courts, had a significant effect on resale price maintenance contracts as a protection of the trademark owner's property interest. The thrust of the Sherman Act was to declare illegal under federal statutory law contracts or other combinations or conspiracies which resulted in restraint of trade in the field of interstate commerce. Under that Act, a so-called fair trade contract between a manufacturer and a retailer was attacked as being illegal and a majority of the Supreme Court held that such a contract did violate the provisions of the Sherman Act. This was in the case of *Dr. Miles Medical Co. v. John D. Parks & Sons Co.,* 220 U. S. 373, 55 L. Ed. 502. It should be noted that this decision was merely a matter of *statutory construction* of the Sherman Act and it has never been considered by this Court that resale price maintenance contracts were in any sense repugnant to *any provision of the United States Constitution.* If in the words of Justice Holmes the Fourteenth Amendment did not adopt Spencer's Social Statistics neither did it adopt Adam Smith's The Wealth of Nations. The Constitution is completely neutral as to any particular economic philosophy or predilection. *Ferguson v. Skrupa, supra.*

Following this case there was a period of some twenty years when price cutting was untrammeled throughout the United States. Finally, California made the first real

effort to re-establish the protection of the now much-abused manufacturer's trademark and good will by passing the first of the state fair trade laws. This Act, of course, could and did apply only to intrastate commerce because of the effect of the *Dr. Miles* case and its interpretation of the application of the Sherman Act to interstate commerce.

Finally, the United States Congress enacted the Miller-Tydings amendment to the Sherman Act and later the McGuire Act amendment to make it possible for the states to take the legislative steps of a fair trade law to protect the owners of trademarks and trade names against the predatory practices of discounters even as they affected interstate commerce. This was the so-called enabling legislation which exempted state fair trade laws from the operation of the Sherman Act. Since the first enactment of fair trade by California in 1931, a total of 45 states have adopted fair trade statutes. Two states—Ohio in the new Ohio Fair Trade Act and Virginia the year before in its new Fair Trade Law—have rejected the old non-signer provision which was originally contained in the California Act and have grounded their statutes on purely contractual principles.

The proprietor's property interest in his trademark or trade name was one of the prime motivating factors which spurred the Ohio Legislature to action in adoption of the 1959 Fair Trade Act and in its efforts to overcome constitutional objections to the old law and to the non-signer provision. In Section 1333.27 the Legislature specifically declared its purpose "to safeguard the good will of trademarks and trade names." In Section 1333.31 the Legislature declared that:

> "A proprietor shall retain a proprietary interest in any commodity with respect to which he is a proprietor after he has sold it to distributors, so long as such

> commodity continues to be identified by his trade-mark or trade name, by reason of his interest in stimulating demand for such commodity through effective distribution to ultimate consumers and of his interest in continuing protection of the good will associated with his trade-mark or trade name."

And in so doing, it is submitted, the Ohio Legislature was merely affirming a common commercial fact of life. Appellant apparently, however, takes the position that there is no property interest in a trademark or trade name. This is significant in that whether or not appellant should prevail in seeking to upset the decisions of the courts below is dependent upon appellant's being able to convince this Court that there is no property interest in a trademark or trade name. That is the crux of the case. Since there is a property interest in a trademark or trade name, surely the Legislature may permit the parties to enter into a contract relationship concerning this property interest arising by reason of the acts of the parties.

Until litigation developed under the Legislature's 1959 Fair Trade Act, there was no real dispute concerning whether a trademark was property. In fact, even the holding in *Union Carbide and Carbon Corp. v. Bargain Fair, Inc.*, 167 Ohio St. 182 (1958), which does not invalidate written fair trade contracts, tacitly recognizes the existence of property in a trademark for this is the basis upon which the manufacturer and retailer can form a fair trade contract.

We submit that the Legislature had a reasonable basis for deciding that trademarks would be damaged by price cutting and that they could be protected from that damage by a Fair Trade Act. Therefore, it is not for the courts to reverse such a legislative judgment.

C. How the Ohio Fair Trade Act Operates.

The new Ohio Fair Trade Act permits contracts to arise from the acts of the parties with respect to an interest in a trademark or trade name.

If a property interest exists sufficient to support a written contract between The Upjohn Company and Hudson Distributors, will that interest not also support the creation of rights and obligations arising by reason of the acts of the parties?

It may be agreed that if Upjohn and Hudson Distributors had designed a written agreement whereby Hudson would maintain Upjohn's minimum retail prices in return for which Upjohn would permit Hudson to use the Upjohn trademark in their retail sales, a valid contract would have been formed between Hudson and Upjohn even though Hudson might be acquiring the products bearing the Upjohn name from a third party wholesaler in Detroit. A sale below the agreed prices would constitute a breach.

The Legislature has now provided that a contract may also exist where Upjohn gives notice of the establishment of its minimum retail prices to Hudson and thereafter Hudson, having received this notice, decides to acquire the commodities bearing the Upjohn trademark and to use those marks in the sale of the commodity.

The only difference between the above two situations is that one agreement is in writing and the other arises by reason of the acts of the parties. Surely there is no constitutional significance to this difference.

If a person owns a piece of property—say, an apple—he may enter into an agreement with another person to sell that apple for five cents. A binding contract arises and the purchaser is obligated to pay the seller five cents. The seller may also place a sign on his apple saying "For Sale—5¢." If another person then comes along, reads the

notice and then takes and eats the apple, he is equally obligated to pay the seller five cents. This result follows even if the apple-eater says to himself while taking and eating the apple, "I intend to pay only three cents." The principle is the same whether the property interest transferred is an apple, a tract of ground, an intangible property interest such as an exclusive franchise or license—or a trademark or trade name.

However, the Legislature went further and provided additional safeguards to the discounter not ordinarily inherent in a contractual relationship. The Legislature provided that a retailer might—even though he had decided to acquire a commodity having a given brand name after full knowledge of the condition on his use of that brand name—escape from the contract if he later regretted his bargain. This the retailer may do by selling the commodity back to the manufacturer at the invoice price. In addition, the Legislature has provided that the retailer may, if he decides not to take advantage of the manufacturer's trade name to assist him in reselling the goods, sell the commodity *qua* commodity at any price he chooses. (R. C. Sec. 1333.33.) In the apple analogy, the purchaser does not have these privileges.

What the legislatures and the courts have really been faced with in resolving questions under the fair trade acts is a proper allocation of competing property rights and interests. There is the interest of the manufacturer in his trademark or trade name and there is the interest in the commodity itself.

The new Ohio legislation introduces new and more detailed safeguards to the retailer than were present in prior fair trade acts. The Ohio Act strikes a balance between the competing proprietary interests. It still permits the owner of a trademark or trade name to set the price or

conditions on the use of that mark or name just as the owner of any other piece of property may fix its price. However, it prevents the owner of a commodity from being arbitrarily forced to accept that price or those conditions by (1) giving him a choice through notice of the conditions before he elects to use the trademark or name, and (2) allowing him to break the relationship with the trademark owner without economic loss even after he has made such an election.

These contract principles—drawn from the language of this Court in *Old Dearborn*—are set forth in Section 1333.28 (I) of the Ohio Revised Code, which is the basic provision of the new Ohio Fair Trade Act:

> "'Contract' means any agreement, written or verbal, or arising from the acts of the parties. The establishment by a proprietor of a minimum resale price for any commodity pursuant to the provisions of Section 1333.29 of the Revised Code and the proprietor's permission for a distributor to acquire and use the proprietor's interest in the trademark or trade name in reselling the commodity shall constitute a contract and sufficient consideration from the proprietor for a promise by the distributor not to sell such commodity at less than the minimum price established by the proprietor. Any distributor (whether he acquires such commodity directly from the proprietor or otherwise) who, with notice that the proprietor has established a minimum resale price for a commodity, accepts such commodity shall thereby have entered into an agreement with such proprietor not to resell such commodity at less than the minimum price stipulated therefor by such proprietor."

It is noteworthy that in the present case, appellant admits that it received notice from appellees of the establishment of their fair trade prices by written contracts with other dealers and of the conditions upon which ap-

pellees were willing to permit a usage of their trademarks and trade names. (RU, pp. 9, 21, 28; RL, pp. 2, 8, 21.) Thereafter, appellant purchased commodities intending to use appellees' marks and names in connection with the resale thereof. Appellant did not have second thoughts concerning these conditions and return the commodities to appellees in order to obtain its money back. Nevertheless, appellant admittedly used appellees' marks and names in selling commodities but disregarded the condition on which the right to use these marks and names had been acquired.

D. The Decisions Below.

In commenting on Section 1333.28 (I) of the Ohio Revised Code, Judge Griffith, speaking for the Supreme Court of Ohio in these cases below, had these extremely pertinent observations to make (RU pp. 417-419):

> "This provision is the core of the act. When read in conjunction with the rest of the act, it provides in essence that, when a retailer with notice that an item has been fair-traded procures it for resale, he is deemed to have entered into an implied contract with the owner of the trademark that he will sell the item at the fair-trade price.
>
> "There is no question that express maintenance contracts, are valid. *Garst v. Harris,* 177 Mass., 72; *Grogan v. Chaffee,* 156 Cal., 611.
>
> "The statute creates an implied contract by act of the parties. The doctrine of implied contracts is almost as old as the law of contracts. The simple illustration of the appellees that, where one takes a candy bar from a grocer's shelf and eats it, he obligates himself to pay for it is a basic example of an implied contract by act. No word need be said; conduct creates the contract.

"It must be remembered that there is no compulsion on a retailer to handle the trademarked goods. Since the act applies only to goods which are in free and open competition with goods of the same nature, he may select other goods for sale. *If he selects the fair-trade goods, it is his voluntary act, and he must abide by the conditions imposed thereon by the proprietor.* The fact that he may not like the conditions is inconsequential. Most of us are forced by circumstances to enter into contracts where we do not like the conditions imposed on us, yet if we voluntarily accept the merchandise we must abide by the conditions attached thereto. *For example, in purchasing a home, there are in most instances restrictive covenants as to use. We may not like such conditions, but if we accept the contract we must abide thereby. Liking or not liking the conditions of acquiring property has no effect on the validity of the contract.* If the retailer chooses to accept the goods, he is bound by the conditions imposed thereon, in this instance, the fair-trade price." (Emphasis added.)

Later in his opinion he said further on this point:

"*Legislative conditions and contracts are not new in the law, they appear in many instances,* and once the parties enter into an agreement they are bound by the legislative contract no matter what the parties intended. This is exemplified in the law relating to insurance contracts wherein statutory provisions and conditions *are imposed in every insurance contract no matter what the intent of the parties. This is true as to statutory bonds, negotiable instruments, bulk sales and mechanics' liens.* (Emphasis added.)

"This provision of the law is essentially very simple. It is simple contract law. The owner of a trademark offers his goods bearing that mark which are in free and open competition in the open market for resale, on condition that the retail price be maintained at a certain level. This is basic contract law; an offer

may be made on condition. Under the Ohio law, the owner of the trademark, once the goods enter into Ohio, has by statute sufficient interest to control the resale price of the goods. The acceptance of this offer is purely voluntary, but if it is accepted it must be accepted on the imposed conditions or not at all. If the offer is accepted, the retailer in consideration of the goodwill attached to the trademark and the demand created by the owner thereof contracts to to sell it at the agreed price."

Then he came to consider the constitutional power of the General Assembly of Ohio to enact this legislation and to answer attacks made on its constitutionality which in essence were identical with those made before this Court in these cases. To this his answer was clear (RU pp. 422-424):

"When the general welfare of the small merchant is considered together with the necessity of protecting the goodwill and value attached to a trademark, it was clearly within the legislative power to enact such protective legislation, and the court will not substitute its judgment in this instance for that of the General Assembly.

* * * * *

"Two other matters are urged as to the constitutionality of this legislation.

"The first of these relate to the delegation of legislative power as to price fixing.

"The final contention is that such act violates the constitutional right of one to sell his own property on his own terms. It having been determined that the implied contracts herein are valid, the retailer takes the goods on the conditions of the offer and thus voluntarily agrees to comply with the fair-trade price.

"The General Assembly has re-enacted fair-trade laws in Ohio. In so doing it met constitutional objec-

tions to the former act (1936) expressed by this court in the *Bargain Fair* case. The nonsigner provision of the old law was eliminated. A retailer will be bound to fair-trade a product only by his own contract, either a written contract or a contract implied under the specific statutory language from the retailer's conduct in accepting the product for resale after notice of its being subject to fair trade.

"It is the intention of the new act to declare and protect the proprietary interest of a manufacturer in his trademark and the good-will attached to it. *Cf. National City Bank v. National Window Cleaning Co., supra.* The means employed by the act is the long and well established legal doctrine of implied contract. None of the constitutional attacks on this new act have merit."

E. Is There a Federal Constitutional Question?

The problem of the validity of a state fair trade act under the Fourteenth Amendment to the Constitution has long since been put to rest by this Court in a case in which every conceivable argument that has been or could be made against its constitutionality under the Fourteenth Amendment was raised. The landmark decision in construing the constitutionality of state fair trade acts was this Court's unanimous opinion in the case of *Old Dearborn Distributing Company v. Seagram Distillers Corp.*, 299 U. S. 183.

The *Old Dearborn* decision represents the undivided thinking of this Court in 1936 and the analysis made by the Court in that case still stands as persuasive authority by reason of its thorough and logical treatment of the problems met by fair trade legislation—problems which have even greater significance today as giant discounters seek to grasp control of the retail marketplace, thereby threatening the economic survival of the independent merchant.

Though its counsel seems loath to admit it, most if not all of appellant's arguments in the state courts below come down to the fact that appellant does not agree with the previous decision of this Court in *Old Dearborn*.

It is interesting that appellant now relies for support of this argument entirely on two cases decided by this Court prior to *Old Dearborn: Browning v. Hooper*, 269 U. S. 396 (1926), which is completely irrelevant to the point at issue, and *Carter v. Carter Coal Company*, 298 U. S. 238 (1936), which was decided by the same court which decided the *Old Dearborn* case in an opinion written by the same judge who wrote the opinion in the *Old Dearborn* case a few weeks before the *Old Dearborn* decision. What was said in that case, as an examination of the facts will show, was completely distinguishable from and irrelevant to the problem presented to the Court by these cases.

This Court noted with great pertinence in *Old Dearborn* that the constitutional assault on state fair trade laws came as an after-thought by discounters seeking to protect their own business interests after the economic arguments of these groups failed to convince the various state legislatures. This Court noted at pages 190-91 of the opinion:

> "It is not without significance that while the proposed legislation was vigorously assailed in other respects, we do not find that any constitutional objection was urged. And the decisions of this court, far from suggesting any constitutional infirmity in such proposed legislation, contain implications to the contrary * * *."

Thus it is important to note that the constitutional assault was conceived at the outset as a second line defense by retail discounters who had already failed in advocating

their economic arguments to the political bodies charged with the responsibility for enacting legislation. The further point noted by this Court in *Old Dearborn* concerning the legal background for fair trade legislation was the fact that resale price maintenance contracts had been considered by the Supreme Court on several occasions without the Court ever hinting that there was constitutional objection to the accomplishment of these purposes by legislative action. In fact, the Court recognized that it itself had invited such legislation at page 191:

> "* * * While these observations of the court cannot, of course, be regarded as decisive of the question, they plainly imply that the court at the time foresaw no valid constitutional objection to such legislation, for *it cannot be supposed that the court would suggest a legislative remedy the validity of which might seem open to doubt.*" (Emphasis added.)

The social and economic need for legislation permitting the manufacturer of trademarked merchandise to exercise some control over the price at which such would be sold under a manufacturer's trademark or trade name was recognized by Justice Oliver Wendell Holmes even before the enactment of any state fair trade law or the federal enabling legislation which has cleared all conflict between state fair trade and federal antitrust laws. Justice Holmes, dissenting in the case of *Dr. Miles Medical Company v. John D. Parks and Sons Co.*, 220 U. S. 373, said at page 412:

> "* * * I think that we greatly exaggerate the value and importance to the public of competition in the production or distribution of an article (here it is only distribution), as fixing a fair price. What really fixes that is the competition of conflicting desires. * * * As soon as the price of something that we want goes

above the point at which we are willing to give up other things to have that, we cease to buy it and buy something else. * * * The Dr. Miles Medical Company knows better than we do what will enable it to do the best business. We must assume its retail price to be reasonable, for it is so alleged and the case is here on demurrer; so *I see nothing to warrant my assuming that the public will not be served best by the company being allowed to carry out its plan. I cannot believe that in the long run the public will profit by this court permitting knaves to cut reasonable prices for some ulterior purpose of their own and thus to impair, if not to destroy, the production and sale of articles which it is assumed to be desirable that the public should be able to get.*" (Emphasis added.)

The Court in *Old Dearborn* gave considerable attention to the question of whether there was a legitimate economic problem to which the state legislatures could address themselves in enacting fair trade legislation. In approaching this question this Court acted with proper judicial restraint where some other courts have sought to match their own evaluation of the wisdom of the law with the conclusions drawn by the state legislatures. When a court follows the latter approach it in effect sets itself up as a supra-legislature and thereby misconceives its function under our tripartite form of government.

The validity of this Court's approach to the economic question presented is evidenced by Justice Sutherland in speaking for this Court when he said in *Old Dearborn*, 299 U. S. at pp. 195-6:

"There is a great body of fact and opinion tending to show that price cutting by retail dealers is not only injurious to the good will and business of the producer and distributor of identified goods, but injurious to the general public as well. The evidence to that effect is voluminous; but it would serve no useful pur-

pose to review the evidence or to enlarge further upon the subject. True, there is evidence, opinion and argument to the contrary; but it does not concern us to determine where the weight lies. We need say no more than that the question may be regarded as fairly open to differences of opinion. The legislation here in question proceeds upon the former and not the latter view; and the legislative determination in that respect, in the circumstances here disclosed, is conclusive so far as this court is concerned. Where the question of what the facts establish is a fairly-debatable one, we accept and carry into effect the opinion of the legislature. *Radice v. New York*, 264 U. S. 292, 294; *Zahn v. Board of Public Works*, 274 U. S. 325, 328 and cases cited."

Although time has passed, the economic controversy concerning the wisdom of fair trade legislation is still raging. The record in these cases contains reams of such economic testimony.

In *Old Dearborn* this Court observed that the primary aim of the law was to protect the property rights—namely, the good will—of the producer in his trademark, brand, or trade name. The Court also noted that the fair trade law does not deal with restriction upon the sale of a commodity *qua* commodity but rather with restriction because the commodity is identified by the trademark, brand or name of the producer or owner. In *Old Dearborn* the Court found that the price cutter had been notified prior to his own acquisition of the commodity of the restriction which had been imposed upon the retail resale of a producer's product where the retailer desired to accomplish such sale with the aid and assistance of the producer's trademark, brand or trade name. That restriction was, of course, the requirement that the producer's minimum fair trade price be observed.

To the argument that the imposition of such restriction involved a delegation of legislative authority, the Court noted in *Old Dearborn* at 299 U. S. pp. 193-4:

"Appellants here acquired the commodity in question with full knowledge of the then-existing restriction in respect of price which the producer and wholesale dealer had imposed, and, of course, with presumptive if not actual knowledge of the law which authorized the restriction. *Appellants were not obliged to buy; and their voluntary acquisition of the property with such knowledge carried* with it, upon every principle of fair dealing, assent to the protective restriction, with consequent liability under § 2 of the law by which such acquisition was conditioned. Cf. *Provident Institution v. Jersey City,* 113 U. S. 506, 514-515; *Vreeland v. O'Neil,* 36 N. J. Eq. 399, 402; same case on appeal, 37 N. J. Eq. 574, 577.

"*We find nothing in this situation to justify the contention that there is an unlawful delegation of power to private persons* to control the disposition of the property of others, such as was condemned in *Eubank v. Richmond,* 226 U. S. 137, 143; *Seattle Trust Co. v. Roberge,* 278 U. S. 116, 121-122; and *Carter v. Carter Coal Co.,* 298 U. S. 238, 311. In those cases the property affected had been acquired without any pre-existing restriction in respect of its use or disposition. The imposition of the restriction *in invitum* was authorized after complete and unrestricted ownership had vested in the persons affected. Here, the restriction, already imposed with the knowledge of appellants, ran with the acquisition and conditioned it." (Emphasis added.)

Upon analysis of the provisions of the Ohio Fair Trade Law and the facts of the cases presently before this Court, is there any reason to alter the analysis or disposition made by this Court in the *Old Dearborn* case? A moment's examination of the facts of these cases reveals that every-

thing said by Justice Sutherland in *Old Dearborn* is equally applicable to the instant cases. In these cases it was not only proved that the appellant acquired the appellees' trademarked commodity with notice of the condition upon its use but this fact was judicially admitted by the appellant in its pleadings. In its second amended petition, appellant states (RU, p. 9):

> "Plaintiff has acquired the commodities bearing the defendant's trade names, trade marks and brand names after receiving notice of defendant's established minimum resale prices. Following receipt of such notice the plaintiff has sold, offered for sale and advertised for sale these commodities produced by defendant at prices lower than the minimum resale prices provided in such notice."

Thus by its own pleading, appellant brings itself squarely within the fact pattern before this Court in *Old Dearborn*.

Examination of the new Ohio Fair Trade Act reveals that it fully complies with the requirements established by this Court in *Old Dearborn* to avert any hint of delegation of legislative authority. In the *Old Dearborn* case this Court implied an agreement or voluntary relationship between the trademark proprietor and the retailer arising from the statutory requirement that the retailer's resale at a discount price must be a knowing and willful act. This implication, drawn by the Court in *Old Dearborn*, is set forth with precision by the statutory language in the new Ohio Fair Trade Act.

As to the argument of appellant that the fair trade law is so arbitrarily unfair or wanting in reason as to result in a denial of due process, this Court considered this issue in 1936 in *Old Dearborn* as involving two points.

First, this Court noted that there was no unreasonable deprivation of the discounter's property rights. Secondly,

this Court held that such limitations as were imposed upon the discounter's property rights fell within a valid exercise of the state police power. With respect to the interference with the discounter's property rights, it is clear that (a) the only right restricted is the right to the untrammeled use of the producer's brand or trade name, and (b) that for even these conditions to be effective the retailer must receive notice of them prior to the time he acquires the trademarked commodity.

This Court commented on a similar limitation of the restrictive provisions to the use of the trademark or trade name in *Old Dearborn*, 299 U. S. at page 195:

> "* * * *The ownership of the good will, we repeat, remains unchanged, notwithstanding the commodity has been parted with.* Section 2 of the act does not prevent a purchaser of the commodity bearing the mark from selling the commodity alone at any price he pleases. It interferes only when he sells with the aid of the good will of the vendor; and it interferes then only to protect that good will against injury. It proceeds upon the theory that the sale of identified goods at less than the price fixed by the owner of the mark or brand is an assault upon the good will, and constitutes what the statute denominates 'unfair competition.' See *Liberty Warehouse Co. v. Burley Tobacco Growers' Assn.*, 276 U. S. 71, 91-92, 96-97. There is nothing in the act to preclude the purchaser from removing the mark or brand from the commodity—*thus separating the physical property, which he owns, from the good will, which is the property of another*—and then selling the commodity at his own price, provided he can do so without utilizing the good will of the latter as an aid to that end." (Emphasis added.)

The second prong of this Court's finding that there was no violation of the due process clause is rested upon the ground that there exists a great body of fact and opin-

ion, justifying legislative exercise of the police power to accomplish the purposes for which fair trade legislation is intended. This observation has been discussed previously.

Although every opponent of fair trade legislation has spoken of its "right" to sell property at any price of its choosing, nowhere have these opponents advanced any reason in law or logic why they, any more than any other group in society, should be accorded the privilege or "right" of engaging in a certain conduct irrespective of its effect upon the property rights of others and upon the welfare of the public generally. The naive assumption that because a person is the owner of property he has the right to do with it what he pleases would lead to incredible results. Would appellant, for example, contend that simply because one is the owner of a car he can drive it at any speed or in any way that he pleases?

The crux of the "due process" issue has never been met by fair trade opponents. It is: (1) whether the restrictions of ownership rights of the retailer-discounter in the commodity itself are fairly dealt with, and (2) whether there is a legitimate economic basis for the exercise of legislative power in effecting such limitations as do exist. The answer to both of these questions as set forth in the *Old Dearborn* case has as much merit today as in 1936.

Relating now these constitutional arguments made by the appellant to the facts of these cases, in both of these cases the facts are clear and admitted by the pleadings. Both the manufacturers involved herein, Upjohn and Lilly, had *established* their minimum prices for their trademarked or trade named products by written contracts with certain of their retailers. (RU, pp. 21, 28; RL, p. 21.) In both of these cases they had, subsequent to the establishment of such minimum prices, given notice to the ap-

pellant of the price which the appellant must pay for using their trademarks or trade names in assisting the appellant in the resale of commodities identified therewith. In both of these cases, with full knowledge of the price they must pay, the appellant not only bought the commodity but also used the appellees' trademarks and trade names in assisting it in the resale of such commodities in complete disregard of the agreement that had been made when it purchased such commodities with notice of this fact. Where the appellant, intentionally or unintentionally, misses the point in these cases lies in the fact that there were not one but two property rights involved. There is the right to the ownership of the commodity *qua* commodity which appellant purchased and with which it could do as it pleased and there is also the right to use the trademark or trade name of appellees which appellant knew it could only use for the price or upon the condition which the owner of that trademark or trade name imposed for its use; namely, the observance of its resale minimum prices. Had appellant been willing to sell the commodity as a commodity without the use of appellees' trademarks and trade names, it was perfectly free to do so under the terms of the contract. Or, having purchased them, it was perfectly free to decide if it did not wish to sell such products and observe the conditions attached to their sale with the trademark and to return them to the appellees. In the latter case, if they were genuinely going out of the business of selling appellees' products, the appellees were required either to repurchase them or to release them from the condition. But appellant desired to have its cake and eat it too. It desired not only to deal with the commodity *qua* commodity but to deal with the trademark and have its assistance in reselling the commodity, thus taking the position that having purchased one right, it got the addi-

tional right without having to pay the price it had by its actions entered into a contract to pay. Therefore, when appellant speaks in its brief of the right of a "remote non-consenting vendee" it is erecting a straw man that doesn't exist. In these cases it was neither remote nor non-consenting. As far as the agreement it made for the use of the trademark, it knew in advance specifically what the price was for the use of that trademark before it purchased the commodity and the trademark. It was not, therefore, remote in its dealings in this respect with the appellees and by its actions it had *consented* and agreed to the terms under which it could use that trademark or trade name.

Clearly, then, analyzed in this light, there are no problems under the United States Constitution presented in these cases that were not clearly present and unanimously decided by this Court in the *Old Dearborn* case. They were also decided, in effect, by this Court as recently as 1961 when this Court dismissed for want of a substantial federal question the appeal in *Standard Drug Co., Inc. v. General Electric Co.;* 368 U. S. 4. In that case a perusal of the grounds presented for jurisdiction by this Court in an appeal from the Supreme Court of Virginia upholding the constitutionality of the Virginia Fair Trade Act covered completely all of the points raised by the appellant in these cases in its Statements of Jurisdiction.

Therefore, it is submitted that this Court can only reverse the decision of the Supreme Court of Ohio and the Court of Appeals of Ohio on constitutional grounds if it is prepared to fly in the face of basic contract principles and, more importantly, to reverse its own unanimous decision in the *Old Dearborn* case. The *Old Dearborn* decision is, we submit, perfectly consonant with all other decisions of this Court, including several cases in which this Court has since that time dismissed for want of a federal

question. Numerous appeals which have been made to this Court on the ground that state fair trade laws were unconstitutional under the United States Constitution have been thus dismissed. To follow the course suggested by appellant would mean a return to the era of decisions in the early 1930's and preceding times when this Court was, justly or unjustly, accused of substituting its own economic predilections disguised as constitutional grounds for setting aside policy decisions arrived at by both state legislatures and the United States Congress. It would mean that competition—even unbridled and unfair competition—was enshrined with a constitutional sanctity. It would mean that in some way the doctrine of Adam Smith was embodied in our Constitution. It would forget that one of the purposes of the Sherman Act itself was the restraint of untrammeled competition.

It is significant that in a recent decision (June 25, 1962) of this Court in the case of *Brown Shoe Co., Inc. v. United States*, 370 U. S. 294 (1962), the Court outlawed a merger, although it admitted in so doing that higher costs and prices to the public might be the result. This Court reasoned that Congress had decided what policy standards should be applied and recognized that it must be bound in the field of competition, as elsewhere, by the policy decision of the Legislature. In this respect the Court said at page 344 of that opinion:

> "* * * A third significant aspect of this merger is that it creates a large national chain which is integrated with a manufacturing operation. The retail outlets of integrated companies, by eliminating wholesalers and by increasing the volume of purchases from the manufacturing division of the enterprise, can market their own brands at prices below those of competing independent retailers. Of course, some of the results of large integrated or chain operations are

> beneficial to consumers. Their expansion is not rendered unlawful by the mere fact that small independent stores may be adversely affected. It is competition, not competitors, which the Act protects. *But we cannot fail to recognize Congress' desire to promote competition through the protection of viable, small, locally owned businesses. Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favor of decentralization. We must give effect to that decision."* (Emphasis added.)

We cite this case as merely illustrating that such policy decisions are still for the Legislature to make even though higher prices might result under the new fair trade law or even though the new law be found inimical to free competition, both of which contentions we do not admit and both of which are in fact contradicted by the evidence in this record.

F. Constitutional and Unconstitutional Provisions Are Not Inseparably Commingled in the New Ohio Act.

A ground for the appellant's Statement of Jurisdiction in these cases is "whether the federally unconstitutional provisions of the Ohio Fair Trade Act are so commingled and entwined with the remainder of the Act and so inseparable therefrom as to make the entire act unconstitutional under the federal constitution."

We have already noted that under the facts of these cases appellant cannot point to any particular section which is involved herein which could conceivably be deemed unconstitutional without a reversal of *Old Dearborn*. It must also be noted that Ohio Revised Code Section 1.13 provides as follows:

"Each section of the Revised Code and every part of each section is an independent section and part of a section, and the holding of any section or a part thereof to be unconstitutional, void, or ineffective for any cause does not affect the validity or constitutionality of any other section or part thereof."

In view of this section of the Ohio Revised Code, it is submitted that no argument which appellant makes to the invalidity of some section or portion of a section of the Ohio Fair Trade Act not involved in these cases would justify the Court in sustaining appellant's attempt to invalidate the sections actually in issue by virtue of the facts disclosed by the record in these cases.

G. The Ohio Fair Trade Act As Applied to the Facts of These Cases Is Clearly Within the Ambit of Permission Granted by the Miller-Tydings or McGuire Act Exemptions to the Operation of the Antitrust Laws.

Recognition of the same economic problems and their desirability for solution at a state level led the Congress of the United States to enact the enabling legislation contained in the Miller-Tydings amendment to the Sherman Act[1] and the McGuire Act.[2] Both of these statutes had in mind the same idea; that is, to permit price maintenance agreements in interstate commerce when authorized by a state "fair trade" law and to take such legislation out of the operation of the Sherman Act and the other antitrust laws. After the decision of this Court in *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U. S. 384 (1951), which held that state fair trade laws could not apply to a so-called "non-signer," the Congress enacted the McGuire

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[1] 15 U. S. C., Sec. 1, 50 Stat. 693.

[2] 15 U. S. C., Sec. 45(a)(1)-(5), 66 Stat. 632.

Act which made it plain that such laws could apply to a party who had not *signed* any fair trade agreement. The McGuire Act clearly was intended to and did apply to what were called "unfair methods of competition in commerce" and "unfair or deceptive acts of practice in commerce." Its enactment was predicated upon the premise that intrabrand price cutting of a trademarked or trade named product is unfair competition and an unfair practice if done in violation of a fair trade agreement between the manufacturer and a dealer. And the law was also made applicable to anyone who knowingly or willfully violated the terms of any contract or agreement for price maintenance between a manufacturer and a dealer on such products whether or not they were parties to the contract. Further, the McGuire Act not only authorized contracts or agreements prescribing minimum or stipulated prices but contracts "requiring a vendee to enter into contracts or agreements prescribing minimum or stipulated prices for the resale of such commodities."

A reading of the first four sections of the McGuire Act makes it perfectly evident that what was done under the facts of these cases in the light of the new Ohio Act as applied to those facts was clearly within the provisions of that enabling statute. The pertinent sections are as follows:

> "(1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful:
>
> "(2) Nothing contained in this Act or in any of the Antitrust Acts shall render unlawful any contracts or agreements prescribing minimum or stipulated prices, or requiring a vendee to enter into contracts or agreements prescribing minimum or stipulated prices, for the resale of a commodity which bears, or the label or container of which bears, the trade-mark,

brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale.

"(3) Nothing contained in this Act or in any of the Antitrust Acts shall render unlawful the exercise or the enforcement of any right or right of action created by any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia, which in substance provides that willfully and knowingly advertising, offering for sale, or selling any commodity at less than the price or prices prescribed in such contracts or agreements whether the person so advertising, offering for sale, or selling is or is not a party to such a contract or agreement, is unfair competition and is actionable at the suit of any person damaged thereby.

"(4) Neither the making of contracts or agreements as described in paragraph (2) of this subsection, nor the exercise or enforcement of any right or right of action as described in paragraph (3) of this subsection shall constitute an unlawful burden or restraint upon, or interference with, commerce."

A reading of these sections against the background of the facts presented by these cases and the applicable sections of the new Ohio Fair Trade Act would seem to leave no room for doubt that nothing in the Ohio Act as applied to these cases is in any way violative of the Sherman Act.

H. There Is No Conflict Between the Ohio Fair Trade Act and the Lanham Act or the Federal Food and Drug Act.

In his shotgun attack on the Ohio Fair Trade Act, counsel for the appellant has included arguments that his client could not sell the appellees' products at a discount price by removing the trademarks on those products because such conduct would be a violation of the Federal Food and Drug Act (21 U. S. C., § 331(b), § 352(a)) and the Lanham Act (15 U. S. C., § 1127).

Actually, the appellant does not claim that the provisions of the Lanham Act would be violated if appellant were to sell appellees' products without the assistance of appellees' trademarks and trade names. Rather, counsel for the appellant has conceived an argument that the State of Ohio is powerless to legislate with respect to the proprietary interest in a trademark or trade name because the federal government has pre-empted this field of the law by its enactment of the Lanham Act. Appellant relies on *Time, Inc. v. T. I. M. E. Inc.*, 123 F. Supp. 446, which has no connection whatsoever with the sale of fair-traded commodities at a discount without the use of the trademark or trade name. Counsel for appellant misreads the *Time, Inc.* opinion and fails to bring to this Court's attention the language therein of the district judge for the U. S. Central District Court of California, wherein he states at p. 453:

> "* * * while the cause of action itself arises under and the remedies are provided by federal law, *ownership of the mark itself arises under and is governed by state law*, except to the extent made incontestable under applicable provisions of the Lanham Act. * * *" (Emphasis added.)

Further, the Court therein states at page 453:

> "* * * Ownership of a trade name or a commercial name, 15 U. S. C. A. § 1127, likewise arises under *and is governed by* state law." (Emphasis added.)

Thus, the opinion upon which appellant relies stands as authority for the proposition that a state legislature may recognize and protect rights in a trademark or trade name. Furthermore, the district court judge in the *Time* case, *supra*, was relying upon *Trademark Cases*, *supra*, which clearly establish this proposition.

Nor is the appellant's argument assisted by reference to the cases of *Sunbeam Corporation v. Wentling*, 192 F. 2d 7, and *Sunbeam Corporation v. Payless Drug Stores*, 113 F. Supp. 31. Neither of these cases stands for the proposition that federal statutory law precludes a state from recognizing property rights in a trademark or trade name. In fact, both of these cases cite with approval this Court's opinion in the *Old Dearborn* case, *supra*, which is the basic recognition of the property rights which appellant now seeks to attack. See *Sunbeam Corporation v. Wentling*, 192 F. 2d 7, at page 9, and *Sunbeam Corporation v. Payless Drug Stores*, 113 F. Supp. 31, at page 44. Further, counsel for appellant fails to mention that *Sunbeam v. Wentling* was simply a holding following the decision of this Court in *Schwegmann Brothers v. Calvert Distillers*, 341 U. S. 384 (1951) to the effect that the non-signer provisions of a state fair trade act did not come within the Miller-Tydings Amendment. The *Sunbeam* case was decided prior to enactment of the McGuire Act which does permit such state legislation. Naturally, counsel for the appellant fails to note that subsequent to the McGuire Act all of such questions as raised in the *Sunbeam* case have been laid to rest by the federal judiciary.

Counsel for appellant next makes the point that the removal of the appellees' trademarks or trade names would be a tortious and an unlawful removal of labels from drugs in commerce. Apparently, appellant is suggesting that if it were to remove the Eli Lilly label, for example, from a drug and replace that label with its own brand name clearly indicating thereon the chemical ingredients of the drug, this would constitute some violation of the law. The very sections of the Federal Food and Drug Act cited in appellant's brief demonstrate the preposterous nature of this argument. Section 352(b)(1), 21 U. S. C., requires only that a drug bearing a label designate the name and place of business of the manufacturer, packer or distributor. Clearly, the law does not require designation of all three. If appellant does not wish to use the manufacturer's trademark or trade name, it would be assumed that it would be willing to label the commodity with its own trademark or trade name and accordingly there could be no violation. Further, if the label identifies the ingredients of the drug (or whatever other item may be involved), then the label certainly could not be held to be false or misleading.

It is submitted that the appellant does, in fact, distribute numerous drugs under its own brand name and knows full well that there is no violation of any law simply because the manufacturer of these items is not identified on the label. It is not difficult to cut through the superficial position in which appellant places itself. Appellant has no intention nor desire whatsoever to sell Eli Lilly, Upjohn or any other trademarked products without utilizing these trademarks in the sale. In fact, it is the trademark that appellant most desires in order to further its business schemes. Rather than conceive imaginary ways

in which appellant might be violating the appellees' rights and expressing pretended concern for the appellees, counsel for the appellant might do well to recognize the fact that this very case arises simply because the appellant is in admitted and flagrant violation of the statutory law of Ohio.

Finally, even if the cited federal statutes were construed to make the conduct of a retailer in relabeling branded merchandise a tort, it is clear that the appellees herein and any other manufacturers desiring to fair trade their merchandise waive any rights they may claim in this respect. The Ohio Fair Trade Act states that the retailer may sell branded merchandise at any price if the brand is removed. When the trademark owner decides to take advantage of the Fair Trade Act, clearly he consents to all of the provisions of the Act, including this one. It is inconceivable that counsel for the appellant thinks for one moment that his client would be in violation of any law were it to sell branded merchandise at a cut-rate price without the use of the appellees' brand names.

V. CONCLUSION.

It has not been the purpose of this brief to elaborate at length on the advantages to our economy and political system of preserving the small independent businessmen, such as the hardware dealer, as a part of the fabric of our society. The Legislature concluded that this is important to the general welfare and that the discouragement of monopoly in retailing is vital to the general welfare. Whether or not the Court agrees or disagrees with this conclusion, it cannot be denied that in view of the evidence presented to it, this is at least a *possible* and *logical*

one. This alone is sufficient to bring this legislation within the ambit of the power and right of the General Assembly to enact this legislation in the promotion of the general welfare. Not only is the concern of the Legislature for the protection of the consuming public from the dangers of monopoly in retailing quite properly within the meaning of general welfare, but also it certainly is just as proper for the Legislature to consider the economic climate necessary to protect small business from extinction as it is to concern itself with the minimum wages to protect labor, price supports to support the farmers, and the varieties of other legislation in which the Legislature has been required to make a determination among competing interests and to balance those interests in promoting the public welfare.

In addition, as even a cursory reading of the transcript of the hearings before both the House and Senate of the Ohio Legislature prior to passage of this Act will make clear, the Legislature was concerned with the threat to the public which the growth of giant retail monopolies would bring about. The Legislature also expressed a very proper concern for the protection of the trademarks and trade names of those small and medium-sized manufacturers who through the production of quality goods and widespread public advertising of such goods developed good will in those trademarks and trade names and a property right quite aside from the commodities themselves. The Legislature felt these interests should be protected against parties who would unscrupulously destroy that good will for their own, rather than the owner's, benefit.

It is submitted that all appellant's arguments come down to a disagreement with this position by the Legis-

lature of the State of Ohio. Having lost that battle before the Legislature, appellant is now asking this Court to reverse *Old Dearborn* and to endow with constitutional sanctity its own conception of what the law should be. It is submitted that this Court should not and will not follow appellant's suggestion.

Respectfully submitted,

R. W. KILBOURNE,

Attorney for The Ohio Hardware Association, The Cleveland Academy of Pharmacy, Ohio Retail Food Dealers, Ohio Association of Tobacco Distributors, Ohio Retail Jewelers Association, The Ohio State Pharmaceutical Association and The Ohio Small Business Committee.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

Nos. 489 and 490

HUDSON DISTRIBUTORS, INC.,
Appellant

v.

THE UPJOHN COMPANY,
Appellee

HUDSON DISTRIBUTORS, INC.,
Appellant

v.

ELI LILLY AND COMPANY,
Appellee

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO

BRIEF AMICI CURIAE OF CORNING GLASS WORKS, THE INTERNATIONAL SILVER COMPANY, THE O. M. SCOTT & SONS COMPANY, RUBBERMAID INCORPORATED, AND WOLVERINE SHOE & TANNING CORPORATION

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I

Introduction and Interest of Amici Curiae

This brief is presented with the written consents of all parties to both of the above numbered cases under Rule 42 of the Court, which consents are filed with this brief.

It is not the purpose of this amicus brief to dwell on all of the various technical arguments which may or may not be presented to this Court in appellant's Statements of Jurisdiction since those will be expertly handled by counsel for the appellees.

This brief is presented on behalf of the above named manufacturers who are interested in the Ohio Fair Trade Act, the cause of fair trade generally and the validity of such legislation and in the belief they can present something of assistance to the Court. These manufacturers have certain things in common: (1) they are manufacturers of non-drug items; (2) they are medium or small-sized manufacturers; (3) they each produce consumer items in the low to medium price range, which items require for their sale the cooperation of thousands of independent retailers in order to attain the sales effort and wide distribution which is necessary if these manufacturers are to produce a quality product on a mass-production basis at a reasonable price; (4) none of these manufacturers are integrated forward vertically, i.e., none of them have their own retail outlets and for the most part they sell through normal channels of distribution to wholesalers who in turn sell to retailers; (5) they believe that they speak not only for themselves but for hundreds of similar small and medium-sized manufacturers who produce quality products for the consumer market at reasonable prices, and in so doing provide the backbone of competition which benefits the consumers and in a sense keep the giant manufacturers of consumer items (particularly those that are integrated vertically), "honest" in their prices; (6) they believe that in so doing they provide thou-

sands of jobs in hundreds of localities throughout this country and provide for the necessary distribution through countless retail outlets in large and small cities thereby making a vital contribution to the nation's economic life, and (7) finally, they are all manufacturers whose products, by reason of continued high quality, reasonable prices and extensive advertising are generally accepted by the public as being good products at reasonable prices.

Finally, there seems to be widespread misunderstanding as to the purpose and effect of resale price maintenance. The subject has been hotly debated for more than fifty years, the public record of this controversy, including the many Congressional hearings, being most voluminous. The amici curiae joining in this brief do so as they are deeply concerned about the lack of understanding of and appreciation for the sound socio-economic basis for the practice of fair trade. Epithets, even that of price-fixing, do not resolve controversies, and they constitute wholly inadequate analytical tools for the determination of sound and rational policy.

It is submitted that the record in these cases will show that one of the primary objects of the Ohio General Assembly in passing this legislation was to protect manufacturers, distributors and consumers alike from the ever-increasing concentration of economic power. The Legislature felt deeply that this was a socially desirable end based upon evidence which was both voluminous and relevant to the end which this legislation sought to achieve.

II

Statement

These cases both represent appeals from the Supreme Court of Ohio sustaining an opinion by the Court of Appeals for the Eighth Appellate District of Ohio upholding the constitutionality of the so-called new Ohio Fair Trade Act on the facts which were before that court. The entire history of these cases and their exact present posture before this Court is not repeated here, as it will be presented with clarity and precision by counsel for the appellees herein. This brief is presented in support of the appellee's position.

III

Questions Presented

The questions presented by these appeals come down, it is believed, to two. First, is the new Ohio Fair Trade Act (Sections 1333.27 through 1333.34 of the Ohio Revised Code), on the record of the facts in these cases violative of any provision of the United States Constitution—more particularly, the Fourteenth Amendment? Secondly, is the new Ohio Fair Trade Act, again under the facts presented by the record in these cases, within the framework of the so-called Miller-Tydings and McGuire Acts,[1] saving exemptions to the Federal Antitrust Laws? We sub-

[1] 15 U.S.C. Sec. 1, 50 Stat. 693; 15 U.S.C. Sec. 45, 66 Stat. 632.

mit that the answer to both of these questions is necessarily in the affirmative and that this appeal should be disallowed.

IV

The Ohio Constitutional Provision

Although it has not been raised directly as a question by appellant's briefs, it would perhaps be well to point out that the decision in these cases in the Supreme Court of Ohio below was by a minority of three of that court who affirmed the judgment of the Court of Appeals for Cuyahoga County, that the 1959 Ohio Fair Trade Act was constitutional. This 3-to-4 minority vote, resulting in an affirmance of a decision of constitutionality, was due to an unique provision of the Ohio Constitution contained in Article IV, Section 2, which reads in part as follows:

> "No law shall be held unconstitutional and void by the supreme court without the concurrence of at least all but one of the judges, except in the affirmance of a judgment of the court of appeals declaring a law unconstitutional and void."

The history and purpose behind this limitation on the power of the Ohio Supreme Court was outlined in the case of *Michaelson* v. *City of Cincinnati*, 27 O.N.P. N.S. 100, 102 (1928):

> "For a number of years prior to the adoption of the Constitution in 1912, there was a great deal of discussion and some severe criticism of the right of courts to declare acts of legislative

bodies unconstitutional and void. At one time this criticism went to the extent of advocating the recall of judicial decisions.

"The constitutional convention in 1912 by Article 4, Section 2, which section was later ratified by the people of this state, placed a check upon the power of the courts of this state to declare acts unconstitutional and void."

These objectives were stated with ever greater clarity in a Law Review article as:

"What were the objectives sought by the convention of 1912? It must be remembered that the convention met in a year when a progressive movement was at its height. Theodore Roosevelt and his followers bolted the Republican Party in that year, and Woodrow Wilson was elected President of the United States. Furthermore, in the period immediately prior to and after the meeting of the convention, workmen's compensation laws were passed by a large majority of the states, and numerous other acts regulating hours of labor and other labor conditions were being enacted. Many of these acts met with unfavorable reception in the courts, particularly in the highest courts of the states and the nation. As a result the progressives felt that the courts were out of sympathy with the wishes of the people, and that it would be necessary to reform the courts in order to put the new programs into operation. Theodore Roosevelt advocated the recall of judicial decision on constitutional questions, while William J. Bryan looked not unfavorably upon a plan to require unanimous approval

of the supreme court before a legislative act should be declared unconstitutional.

"In the Ohio Constitutional Convention there was a very pronounced opinion to the effect that the state supreme court was too far removed from the people, and, its powers, in favor, first, of the lower courts, and, second, of the legislature. * * *"[1]

This Court has passed upon the validity of this Ohio Constitutional provision under the United States Constitution. In a unanimous opinion written by Chief Justice Hughes, in *Ohio* v. *Akron Park District*, 218 U.S. 74, 50 Sup. Ct. 228 (1929), it was held that this provision violates none of the provisions of the United States Constitution, saying, *inter alia*, at page 80:

". . . The opportunity afforded to litigants in Ohio to contest all constitutional and other questions fully in the Common Pleas Court and again in the Court of Appeals plainly satisfied the requirement of the Federal Constitution in this respect and the State was free to establish the limitation in question in relation to appeals to its Supreme Court in accordance with its views of state policy."

Thus, it is evident that there is no United States constitutional question presented by this provision of the Ohio Constitution, or its role in this litigation.

[1] Stene, Is There Minority Control of Court Decisions in Ohio, 9 U. Cin. L. Rev. 23 at 25 (1935).

V

Summary of the Argument

1. The Ohio Legislature enacted its 1959 Fair Trade Act on the basis of its extensive economic and social findings and for the purposes stated in the Act itself which included the promotion of the public welfare by recognizing the property rights in a trademark or tradename and by recognizing the interest of the small independent merchant and of the consumer against the increasing predatory practices of price discounters.

2. The Ohio Legislature, in enacting the new Ohio Fair Trade Act, recognized a property interest in a trademark or tradename and the commercial fact of life that using this property interest as a traffic builder in discount houses constitutes irreparable damage to the good will of the manufacturer developed over the years in his trademarks and tradenames.

3. The new Ohio Fair Trade Act is specifically grounded on contract principles so that no retailer is bound to its provisions unless that retailer has knowledge of the conditions on the use of a manufacturer's trademark or tradename at the time such retailer acquires a commodity desiring to use that trademark or tradename in the resale thereof.

4. The Supreme Court of the United States will not concern itself with the merits of the social and economic arguments which prompted the Ohio Legis-

lature to enact its fair trade law. It is not the function of this Court to serve as umpire for the purpose of judging the merits of the competing economic contentions, all of which were considered, evaluated, and the merits thereof determined by the state legislature.

5. All contentions that the Ohio Fair Trade Act violates the due process clause of the Fourteenth Amendment have been laid to rest in the case of *Old Dearborn Distributing Co.* v. *Seagram Distillers Corp.*, 299 U.S. 183 (1936).

6. The Ohio Fair Trade Act does not constitute unlawful price fixing inasmuch as it only permits the owner of a trademark or tradename to set the conditions on the use of that trademark or tradename and since fair trade acts are specifically exempted from the Federal Antitrust Laws by reason of the McGuire Act and the Miller-Tydings Amendment.

VI

Argument

In addressing the first of the questions presented above, one must first look at what the 103rd Ohio General Assembly actually did in enacting the so-called "new" Ohio Fair Trade Act. Why did it take the action which it took? What were the social and economic problems to which the General Assembly was addressing itself? And, was the solution that the General Assembly reached relevant to the problems to be solved and thus within the ambit of its police powers?

Fortunately, in the record of these cases, the Court has before it the transcript of all of the hearings which were conducted on this legislation before both the Senate and House Judiciary Committees of the 103rd Session of the Ohio General Assembly. Those hearings are lengthy and extensive, and reveal how seriously the Ohio Legislature studied this problem, and the extent of the economic data and facts on which it acted. In addition, in the record of these cases there are many affidavits and other material bearing upon these same economic questions which motivated the action of the Ohio Legislature. It is significant that the Ohio Legislature, after three lengthy, full-dress hearings on this matter before the Judiciary Committee of the House, and after three additional equally lengthy hearings before the Judiciary Committee of the Senate, passed this legislation overwhelmingly, and almost unanimously.

When the governor vetoed this legislation because of a disagreement on the policy behind the statute, the same Legislature, although predominantly of the same political faith as the governor, again passed the legislation. Notwithstanding the governor's veto, the second vote was nearly as overwhelming as the first. Certainly under these circumstances any court must approach a decision which would declare the General Assembly impotent in these premises with the utmost gravity, and would strike down its action only if certain beyond a doubt that there was no reasonable or rational basis or justification for the legislative actions so taken.

The issue before the Court is not whether the new Ohio Fair Trade Act is wise or unwise legislation.

or whether this Court, acting as a supra-legislature, would have enacted the law, but rather whether or not the new Act as adopted by the Ohio Legislature in 1959 after the most thorough study and consideration is violative of the United States Constitution.

A. The Economic Need That Prompted the Ohio Legislative Act.

The economic reasons which have led the state legislatures of forty-four states, the Congress of the United States, economists and businessmen to conclude that there is an economic need for fair trade legislation may be divided generally into three categories. The first relates to the benefit received by the trademark owner whose good will and proprietary interest in his trademark is protected under the law. A second set of reasons concerns the benefit to the small independent merchant whose competitive position is protected by fair trade legislation. The final category includes those economic arguments which demonstrate the benefit that the consumer and the public generally derive from fair trade legislation.

Generally speaking, all of these economic arguments are ones which the leigslatures of more than forty states have found to operate in the public interest. Overriding public interest is found in preserving a system of marketing which results in mass production, broad distribution and product development based upon consumer acceptance of merchandise identified by trademarks and tradenames. Similarly, those economic facts which demonstrate the benefit of fair trade legislation in preserving competitive opportuni-

ties for small business were thought to have an overriding public benefit based upon the legislative belief that the public welfare is assisted when the small businessman is not driven from the market place by giant discounting retailers. A further classification and discussion of the economic data and findings that underlie the enactment of fair trade legislation may help clarify the role and practical operation of such legislation.

1. *The Effect of Price Cutting on the Manufacturer's Trademark or Tradename.*

It has been frequently stated that the state-established and federally-recognized right of resale price maintenance flows from the desire of the manufacturer to protect his trademark and the goodwill associated therewith. In the case of a forwardly integrated producer, such as Sears Roebuck or A & P, or in the case of a consignment seller, or in the case of a publisher of a newspaper or periodical, a resale price maintenance structure occurs, either as a matter of unquestioned legal privilege, or as a matter of custom. In the case of other producers of popular trademarked items, the impetus to engage in a program of resale price maintenance occurs as a matter of marketing pragmatics.

Such impetus or motivation occurs when the trademark owner experiences injury at the hands of price-cutting retailers. The very existence of the trademark, and the absence of legal control over distribution practices, often give rise to a destructive, short-term exploitation of the intangibles symbolized

by the trademark. This non-consensual exploitation of the trademark—the drawing power of a well-known brand—to the overall detriment of the creator and owner thereof, and by an outsider, has been aptly described as commercial jiujitsu, where the very strength of the trademark is used to its undoing.

The effect on the manufacturer's trademark or tradename is well documented by the record in the instant case. In the Spring of 1958, Hudson Distributors, Inc., the discounter herein, opened a discount drugstore in the middle of the business section of Cleveland. It is a cut-rate operation. It emphasizes vitamin products and has capitalized particularly upon Upjohn's well-known Unicap and Zymacap (R.U. 104). (Record references hereinafter indicated—Record in the Upjohn case, No. 489, R.U. —; Record in the Eli Lilly case, No. 490, R.L. —). During the first three months of 1958, before Hudson Distributors opened its business, Upjohn's net sales (net sales means total sales less returns) of Unicap vitamin capsules in the Cleveland district were Eleven thousand two hundred dollars (R.U. 103). In the same period during 1959, after appellant commenced its business, the net sales were down to Eight thousand five hundred twenty-nine dollars, and in the same period during 1960 they approached the vanishing point of One hundred six dollars (R.U. 103).

Similar results occurred with respect to the sale of Zymacap vitamin capsules. During the first three months of 1958 the net sales of Zymacap vitamin capsules in the Cleveland district were Three thousand

seventy-three dollars. In the same period during 1959 they were reduced by almost fifty per cent to One thousand two hundred seventy-nine dollars. During the first three months of 1960 the druggists returned One hundred one dollars more of Zymacap vitamins than they purchased (R.U. 103). That this destruction of Upjohn's vitamin business in the sale of Unicaps and Zymacaps in the City of Cleveland is the direct result of the appellant's price-cutting is attested to not only by a representative of the Upjohn Company but also by local independent pharmacists who were themselves the victims of appellant's price-cutting tactics.

Pharmacist George Bruehler stated that in 1958 his total purchases of Unicap and Zymacap vitamin capsules amounted to \$1,093.48, all of which were sold (R.U. 153). In 1959, he purchased \$1,200.09, but had to return \$723.15 for net sales of \$476.94 (R.U. 153). Mr. Bruehler says his customers are always telling him how they can buy their vitamins more cheaply at Hudsons, and concludes: "There is no question but that the price-cutting carried on by this establishment is the primary, if not the sole cause of my loss of vitamin customers." (R.U. 154).

Pharmacist Philip Rudolph had a similar experience with his sales of Upjohn products, which decreased by over seventy-five per cent after the entry of the Hudson discount operation into the market. Rudolph states that he has taken a great deal of abuse from his customers, with one of them calling him a "Jesse James" (R.U. 158). The response that the pharmacist makes in this situation does irreparable

harm to the manufacturer. When Hudson began selling certain Upjohn products at drastically reduced prices he could not continue to push these products or give them the top-of-the-counter display space that he had before. In order to avoid criticism from his customers, his Upjohn products were shifted to an inconspicuous corner of his store where few customers would be likely to notice them (R.U. 158). Other Cleveland pharmacists, including Joseph Gross (R.U. 150-53), Nick Avellone (R.U. 137-39) and Fred J. Cermack (R.U. 139-41) tell the same dismal story.

Professor William R. Davidson of Ohio State University, and a joint author with Professor Theodore N. Beckman of the widely used college textbook entitled "Principles of Marketing", states the economic theory which demonstrates the damage that can be done to a proprietor's interest in a trademark or a tradename in the absence of effective fair trade legislation. Professor Davidson, whose textbook is used as the basis for advanced undergraduate and graduate courses in marketing in over two hundred universities (R.U. 110) states in the record below: (R.U. 114-16)

> "Specifically, in these situations the brand name owner is damaged in the following ways: (1) The price-cutter who accounts for a small part of total sales in the market area and provides few of the services expected of regular retail outlets, creates the false impression that his advertised low price is the value of the product at retail, thus leading customers to believe that the bulk of retail service outlets and the manufacturer through its price maintenance policy are gouging the public through unreasonably high prices;

(2) this damages the good will and value of a brand name or trade-mark which has been appropriated to the price cutter's use; (3) these price-cutting activities prevent the average complying retailer from being able to sell the product at a profit and they must therefore (a) deemphasize the product in their merchandising and promotional strategy, offering it only upon specific demand, and shift selling effort to other items which provide fair compensation for services rendered, or (b) discontinue handling the product altogether, or (c) cut prices in retaliation and an effort to compete, breaking their own agreements with the manufacturer and creating expensive and ultimately unmanageable problems of enforcement for the manufacturer seeking to maintain control of his distribution system; (4) the likely development of retaliatory [fol. 128] price wars further devalue the product in the minds of the public and create a hesitancy to make the purchase resulting from the consumer's thought that he may be able to buy the product cheaper elsewhere since he knows that it is subject to footballing and price warfare; (5) since well-established branded merchandise with professional consumer acceptance and known value is a most suitable weapon for advertised price-cutting by cut-rate organizations, this creates an animosity toward brand name products by the essential small retailer who sees in them the cause of the potential business failure he fears; (6) the price-cutter, while using Upjohn's brands as bait to attract commercial traffic, actually places its selling emphasis on other competitive

products that afford him a higher margin, thus using Upjohn's brand names established over a long period and at considerable expense to promote the sale of products other than those of Upjohn; (7) the services accompanying sale of Upjohn's products necessarily will diminish as profit margins narrow, thus eliminating such items as advice concerning product use, refrigeration, and care of product, all of which makes the product less desirable to the consumer; (8) by forcing Upjohn to take legal action to prevent price-cutting tactics and protect its distributive system, the price-cutter further damages the good will of Upjohn by the publicity surrounding the price-cutting establishment's opposition to price maintenance, thus making it a champion of the consumer and placing the manufacturer in the role of villain."

While retailers were interested in protecting themselves against the practices of the predatory price-cutter, it is also evident that manufacturers were equally alarmed at the injury done by such discounters to their systems of distribution and to their property rights in their trademarks and tradenames. Obviously, one of the very best tests of the damage done to a manufacturer's good will in his trademarks or tradenames is met by the willingness of these firms to stand the expense of extremely costly litigation to protect their rights against the tactics of the predatory price-cutter. Replying to the contention that the tradename owner's interest is not protected by fair trade laws, Professor Davidson says (R.U. 116):

"Allegations that price-cutting tactics do not

injure the manufacturer stem from a failure to understand the significance of marketing services, the injury done to a manufacturer's good will by trading on his trademarks and [fol. 129] trade name by means of price-cutting, and the damage done from disruption of the distribution system by concentrating a product's outlets away from the local independent retailer and into the large cut-rate operator. Even the standard argument that the manufacturer is compensated because the larger volume of the price-cutter ads to his total distribution is fallacious. Any such gain by additional distribution is more than likely offset by lost sales in regular outlets.

"Further, the damage to the manufacturer's good will will ultimately mark a decline in the sales by the cut-rate organization even though that organization creates an initial flurry of sales by its tactics. Thus the argument that a manufacturer is not damaged because he receives the same price for his product from the price-cutter as from the regular retailer misses the issue.

"Naturally, the manufacturer desires to maintain his prices as low as possible to compete successfully with similar product lines of other manufacturers and increase his share of the total market for his general class of products. Further, he will be slow to raise the stipulated price in the face of rising costs once the stipulated price has become widely known to physicians, pharmacists and the public. However, conceding that the manufacturer desires to keep his price as low as possible, it does not follow that it is desirable to the manufacturer to have

prices irregularly reduced by price-cutting organizations under the motives which prompt such organizations to act."

John W. Hubbell, Vice President of the Simmons Company, makers of Simmons' mattresses, related one manufacturer's personal experience with a discounter's violation of its fair trade system. He states (R.U. 120):

"For example, a large discount house in New York advertised the fact that they had Simmons 'Beautyrest' mattresses at cut prices. Many consumers told us that our merchandise was maligned in this discount house. This was no surprise because the store found it necessary to degrade our merchandise to avoid selling it. It was difficult for them to get a supply and also they had to sell it at a loss."

Along similar lines, Herman T. Van Mell, General Counsel for Sunbeam Corporation, tells at length the consequences to Sunbeam Corporation that have resulted in market areas where either (a) there has been no fair trade legislation, or (b) the enforcement of fair trade laws has been emasculated by court decision (R.U. 128-34).

The ultimate result of all these practices does not and will not increase the total volume of business done. It will only shift the business from the small and generally scrupulous merchandiser to the large and economically unscrupulous. In fact, on the items used as price footballs, the total volume of business may soon decline thereby producing a drop in the economy.

Lee Waterman, Vice President of Corning Glass Works, states the effect that price-cutting has had on his Company's products (R.U. 136):

> "We have found that the approach of the price cutter is different from that of the small independent service retailer. Our line of 'PYREX' products has been advertised extensively over a considerable period of years and is well known to consumers. The price cutting discount house takes two or three or four of our best known items and advertises them at very low prices so as to attract attention to himself. This makes the small dealer look bad in the eyes of his own customers. In effect, it is an unfair comparison and it injures the small dealer. If it continues hurting the small dealer over a period of time, our distribution system is damaged and can be destroyed."

Viewing the problem from the standpoint of the manufacturer and his trademark and distribution system and the threats of uncontrolled price-cutters to the very basis of our economic system, which the legislature did, the conclusion that the protection and promotion of the general welfare required this legislation is amply justified. These points have been discussed to some extent *supra,* and are fully covered in the affidavits in the record transmitted to this Court from the court below. One further bit of the evidence presented to the Judiciary Committee of the Ohio Senate (R.U. 315) is particularly significant. This involves the story of John J. Reidy, President of the Schick Company, relating the effect upon distribution of Schick electric razors in Ohio after the

decision in ***Union Carbide and Carbon Corp.* v. *Bargain Fair,*** 167 Ohio St. 182. As set forth commencing at R.U. 315:

> " 'For Schick, Incorporated, the immediate result of these conditions in Ohio and elsewhere has been a severe decline in our business volume and profits, and a resulting decline in our em-employment.
>
> " 'How did this result, which has been detrimental to all concerned—retailers, wholesalers, consumer and manufacturer—come about? I am sure you are aware that with the weakening of Fair Trade, price cutting in our industry flourished. As it progressed, the following pattern developed in Schick's business in Ohio and was repeated throughout the country as Fair Trade diminished.
>
> " 'The barrage of cut-price advertising on electric shavers reached a crescendo that left the public confused, distrustful, unable to understand the variety of prices. More important, the consumers were hesitant to buy because they thought the price would be cheaper tomorrow.
>
> " 'Small dealers retrenched to the point where they carry electric shavers only as an accommodation—never in volume, usually hidden under the counter, seldom giving these products in-store or window display or even calling a customer's attention to them.
>
> " 'At this juncture, retail outlets were getting electric shavers at, or just over wholesale cost—either through their own wholesale subsidiaries

or by working with price distributors who sold at their delivered cost or two or three or four per cent over cost. This, naturally, put most small dealers at a disadvantage, since they were forced to pay more at wholesale than the competition around the corner was selling the electric shavers for at retail.

" 'This form of wholesale discounting spread through the entire industry and, as in retailing, it soon became unprofitable for the wholesaler who performs the full distribution function to promote and sell electric shavers.

* * * *

" 'As a result of the above, Schick's Ohio dealer organization dropped some 65 per cent. Nationally our dealer organization shrank from 35,000 to about 7,000 dealers. All of us, wholesalers, dealers and manufacturers, found ourselves trying to do business in a virtual nonprofit climate. The reckless price-cutting by opportunistic outlets, capitalized on the millions of dollars the industry has spent to develop the electric shaver business, using our brand as an attractive, loss-leader to be thrown out when it has been milked. The growth our industry had experienced under Fair Trade was reversed. Not only profits were lost, but an important franchise as well.

* * * *

" 'Schick's brand name and good will has suffered a severe set back. Under Fair Trade, the consumer bought with confidence that the pricing was realistic, and it was. Today many of our customers are unhappy because they did not get

the low, low price out of the past twelve months' bargain basement for electric shavers. Price cutting has driven the relative value of our product down in the eyes of the consumer. This is reflected in the price he is willing to pay for an electric shaver—a price that now bears little relationship to the cost of producing and marketing that shaver.

"'Once an industry's volume drops, as ours has, and the discount ads no longer pull, the discounting retailer will turn to another product. Then the long painful rebuilding job begins for the manufacturer, if he survives.'"

In the legislative hearings held prior to the enactment of the Ohio Fair Trade Act, President Herman Nolen of McKesson & Robbins, previously a professor of business organization and marketing at the College of Commerce at Ohio State University, testified to the many ways in which the lack of fair trade legislation or ineffective enforcement of fair trade legislation leads to serious damage to a manufacturer (R.U. 177-185). Numerous other officials representing manufacturers of trademarked merchandise appeared before the Ohio Legislative Committees to lay before those groups the economic need for fair trade legislation to protect the manufacturer's good will in his trademark or tradename. Without reviewing all of this testimony in detail, and without a review of the extensive economic literature and testimony in hearings before the United States Congress and the legislatures of other states, it is probably sufficient to summarize.

It is clear that, on the basis of empirical evidence, the property rights of the manufacturer in his tradename are damaged in the absence of a fair trade law. Secondly, a strong and logical explanation of this damage is advanced by economists such as Professors Davidson and Nolen. Finally, the manufacturers themselves, who are the best judges of the damage to their property rights, are convinced, on the basis of their own experience, that fair trade legislation is essential to protect their property rights in their trademarks and tradenames.

The Ohio Supreme Court recognized the validity of these arguments when it said (R.U. 421-22):

> "The continued discount selling of a trademarked product eventually cheapens it in the eyes of the purchasing public. If such product is sold at a reduced price the public will eventually get the idea that the product is cheap and turn to others, seeking higher quality merchandise. It does not occur to them that the quality is good and that the discounter is using the merchandise as a loss leader to advertise his store. This fact is well borne out by the fact that it is the owner of the trademark who urges that his merchandise be fairtraded. If discount selling did not injure his total sales, he would have no interest in the retail price. It must be remembered that the proprietor sells his goods at the same price and reaps the same unit profit no matter what price the ultimate consumer pays. Clearly, the owners of trademarks have discovered that discount selling of their products eventually cheapens them in the

eyes of the public with the ultimate effect of injuring the value of the trade-mark or trade name and reducing their total sales."

2. *The Effects of Price Cutting on the Small, Independent Merchant.*

In the opinion below, Judge Griffith commented about the threat that price-cutting creates to the continued existence of the independent merchant (R.U. 420). The effect occurs in several ways. First, price warfare among competing retailers selling a manufacturer's commodity generally results in the strongest retail organization which can afford to sell certain items at an unrealistically low profit (or perhaps even below cost) driving the small independent retailers out of the market. The most effective weapons in such price warfare are nationally advertised brand name merchandise which is readily recognizable by the consuming public when prominently displayed in the discounter's advertisements. The discounter is not concerned with the absence of a fair rate of return on these few items since his motive is to use them to build his overall business and to strengthen his competitive position against the smaller retailers. Nor is he bothered by the fact that this reduces the manufacturer's overall sales and undermines the very reason why a manufacturer has invested years of effort and thousands of dollars in building a recognized tradename associated with a commodity of value.

The overall effect of price-cutting is to drive the product out of the stores of the many and into the stores of the few.

If the discounter is successful in his program to capitalize on trademarked merchandise, he will destroy his competition and secure a larger section of the market for himself. Evils of this tendency to monopoly affect not only those thus eliminated, but the welfare of the public generally, inasmuch as in the long run monopolistic conditions do not make for lower prices. For recognition of this principle see *Standard Oil Co.* v. *United States,* 221 U.S. 1 (1910); *United States* v. *American Tobacco Co.,* 221 U.S. 106 (1910).

A second way in which fair trade legislation operates to preserve desirable small business lies in the capacity of a fair trade pricing system to make possible the offering of conveniences and services in connection with the sale of these products. These services and conveniences are the chief economic weapons used by small retailers in their struggle for survival against the discounting giants. Price-cutting of branded merchandise denies to these smaller competitors the economic ability to compete on the basis of service.

A third way in which the small businessman is damaged in the absence of effective fair trade legislation is that he may be forced to provide service on the items sold by the discounter, who is seeking only a quick profit on a fast turnover. The practice has become increasingly prevalent for a consumer to buy the branded merchandise from a discounter who sells at little or no profit to build up his business and then to seek service on this merchandise from the independent retailer. There is even a considerable prob-

lem created by the action of some consumers in trying to return and receive cash credit from the independent merchant for items purchased from the discounter (R.U. 147).

The Ohio Supreme Court recognized the validity of these arguments when it said (R.U. 420-21):

> "*Even to the most casual observer it is readily apparent that the small independent merchant is gradually being forced out of business, through the operation of the large merchandising establishments.* Even without discounting fair-trade items, these large merchants through their tremendous buying power are able by quantity buying to legitimately undersell the small merchant and to attract his trade. When, in addition to this legitimate underselling, the discounter uses fair-trade items as a come-on, selling items at cost or even at a loss to entice customers into his store, it is apparent that the small merchant will be doomed, he cannot afford to compete on this level, and his customers will go to this discounter to buy. Yet this small independent merchant is a necessary and integral part of the community. It is to him that the consumer turns for little-called-for items that the discounter does not choose to handle, and quite frequently it is to him that the customer turns for personal service not rendered by the large discount establishments. Yet, as a result of the discounting of fair-trade merchandise, so much of his trade is being drained from him that he cannot afford to continue his business. Clearly, it is to the advantage of the general public that such establishments be preserved." (Emphasis added)

3. *The Benefit to the Consumer.*

The public, including the consumers, is the direct beneficiary of the lower costs made possible by mass-production techniques, all of which are facilitated by the development of mass marketing systems, distributing trademarked products recognized by the purchasing public as items of quality. The public, including consumers, are the beneficiaries of a policy designed to preserve a large number of conveniently located and independent distributors of consumer goods.

The Ohio Legislature found that the consumer was directly benefited in certain additional ways. One purpose the discounter has in price-cutting on well-known products is to lure customers into his store where they may be induced to buy unknown, unbranded articles at an unreasonably high price. This deception practiced upon the public results in the public paying a higher margin of profit for goods of a lower quality (R.U. 117, 123, 205, 230, 231). For a typical example, see the allegations relating to the practices of this appellant contained in FTC Docket No. 8576.

Another way in which the public suffers from discounting practices is in the forfeiture of service and convenience usually obtained from the seller of merchandise (R.U. 124). Emphasis placed by competing retailers on selling the same product at a price below that of other retailers (even, if necessary, below cost) discourages the retailer from providing necessary services in connection with the sale of its products. Reference is made to the Crable Affidavit

(R.U. 148) for a concrete illustration of the truth of this principle.

The Legislature found specifically that the consumer is not harmed by a manufacturer's execution of retail price maintenance contracts conditioning the use of his trademarks as to the sale of these products. There never has been any empirical evidence to support a contention that prices are higher in states operating under effective fair trade laws than are prices in states which have no fair trade laws. In fact, the record before the Ohio Legislature contains evidence to the contrary based upon the survey of A. C. Nielsen Co. (R.U. 230-31, 321-22).

This finding that fair trade laws do not increase consumer prices (R.U. 203) is not surprising. Competition is not restrained by the Ohio Fair Trade Act among the producers of rival articles, who will seek to make their prices as competitive as possible, but only among dealers selling the same articles. The Ohio Fair Trade Act operates only in instances where the product involved is in free and open competition with other commodities of the same general class in the same market area (R.U. 201). The producer is, in effect, seeking only to avoid competing with himself. Another manufacturer is free to undersell the producer and thus give the public a large number of choices, even as to price. Thus, prices will be kept down by competition between manufacturers as well as by the tendency of consumers to refrain from buying an article if it is too expensive.

The consumer is not affected by retail price maintenance any differently than if the manufacturer sold them directly through his own chain, as is the

case with many large concerns such as A & P, Sears-Roebuck and Woolworth, etc. Actually, the Fair Trade Act does no more than put the proprietor of a trademark who does not own his distribution outlets on the same footing with forwardly integrated producers as to the vital element of resale prices (R.U. 207).

4. *Summary.*

The Legislature reviewed economic data sufficient to lead it to the conviction that by the enactment of the new Ohio Fair Trade Act it was furthering wholesome competition in preventing monopoly in the distribution of goods, aiding a marketing system that would increase gainful employment and reduce production and distribution costs, and also preserving small business from unfair competition, all for the benefit of the consumer and for the well-being of the citizens of Ohio (Sec. 1333.27 (A), Ohio Revised Code).

Ohio is not the first political subdivision whose legislative body has been motivated by these economic considerations. The legislatures of some forty-three other states, as well as the United States Congress, have reviewed similar economic data and have reached similar conclusions.

B. The Ohio Legislative Response.

In 1959 the Ohio Legislature took a hard and exacting look at the need for new fair trade legislation supplanting the old 1936 Fair Trade Act which had been invalidated by a decision of the Ohio Supreme

Court in *Union Carbide & Carbon Corp.* v. *Bargain Fair, supra.*

Thorough debate and extensive legislative hearings were held by both the Ohio House Judiciary Committee and the Ohio Senate Judiciary Committee. These hearings, as mentioned *supra,* are a part of the record in the instant case.

In the enactment of the new fair trade law, the Legislature took the care to include a purpose clause (Ohio Revised Code Sec. 1333.27) in which it spells out those findings and specific considerations which prompted the enactment of the new Fair Trade Act. This was done by the Legislature in order to avoid any mistake or misinterpretation concerning its intentions. These purposes are:

"1. To protect and preserve small business.

"2. To safeguard the good will of trademarks and trade names.

"3. To further wholesome competition and prevent monopoly in the distribution of goods.

"4. To promote the public welfare by securing wider distribution of commodities and an increase in the production thereof, thereby reducing production and distribution costs and protecting and increasing gainful employment in manufacturing, wholesaling and retailing, all for the benefit of the consumer and the well-being of the citizens of Ohio.

"5. To remove obstructions to the marketing of identified merchandise in commerce which are occasioned by unfair selling practices."

In enacting the new Ohio Fair Trade Act, the Ohio Legislature decided to shift the emphasis from the non-signer concept and to develop contractual rights and obligations between the proprietor of a trademark or tradename and the retailer desiring to use that mark in the sale of products. This concept was based upon the right to the preservation of the property interest in a trademark or tradename, and including a continuing interest in the commercial use of the trademark by all vendees. It is noteworthy, as is pointed out in more detail, *infra*, that the Ohio General Assembly in thus acting followed not only the previous action of a year or so before of the Virginia Legislature but, more importantly, adopted the specific reasoning and rationale for such legislation as had been decided by this Court in its unanimous decision in the case of *Old Dearborn Distributing Co. v. Seagram Distillers Corp.*, 299 U.S. 183 (1936). The Ohio Legislature merely made explicit in this statute those things which this Court had found implicit and wholly constitutional in the Illinois and California statutes.

1. Property Rights in Trademarks Have Historically Been Recognized by Courts and Legislatures.

In the early days of retailing in this country, goods were sold basically in bulk. The cracker barrel and the flour bin were typical marks of the ordinary retail outlet. As time went on, however, producers of goods became more and more aware of the advantage of identifying their goods by a trademark or tradename. Manufacturers realized the advantage of identifying and packaging their goods by label so

that people who had liked them the first time would be able to recognize them and buy them again. Thus many types of goods became known and accepted by the retailers' customers by virtue of the identifying trademark of the manufacturer. Inevitably some stores began to take advantage of this practice of manufacturers by cutting prices on these consumer accepted goods for the purpose of attracting trade to their stores where perhaps they could then sell the unsuspecting customer on goods of unknown origin on which the retailer could make a greater profit than it could on the cut-priced trademarked goods. The discounter was thus at an early date seeking, as he does now, to capitalize to his own advantage on the well-known reputation and good will of the trademarked item.

As these predatory practices became more prevalent, the producer of the trademarked item became aware of the effects of these practices on his distribution system. Other stores which were handling his goods complained. Sometimes they either discontinued his product or refused to give it the display space and other service elements necessary for its sale; customers were confused as to the true value of his product when it was offered at different prices in a dozen different locations. As a consequence the producer's good will was undermined, his distribution system was severely hurt and his sales for that market diminished.

A manufacturer whose identified products have a compartively low per-unit price, but general public acceptance, must have a widespread distribution sys-

tem so that the product is easily available to would-be consumers in a wide variety of outlets. If it is "footballed" in price as a customer "come-on" by a few large discounters using it as a "traffic-builder", the great number of smaller neighborhood retailers who do not have the space or the capital to stock a wide variety of other merchandise wherein they can "make up on the banana what they lose on the orange" cannot afford to handle, and certainly cannot promote such manufacturer's trademarked product at the prices of the discounter without giving all of their profit away. Consequently, faced with the dilemma of either being embarrassed with their customers by seemingly offering products at too high a price or selling such products at no profit or perhaps a loss, these smaller retailers either refuse to handle that manufacturer's trademarked product at all or at least hide it under the counter and sell it only upon specific demand rather than displaying and promoting it as they did when they were able to obtain their normal markup on it. The manufacturer's wide distribution system is thus destroyed and he is faced with the anomaly of selling less of his products because of the shrinkage in the number of his outlets, despite the fact that a few large discount houses are temporarily selling his product at a very low price. Eventually, when the public image of this product as worth a certain established price is destroyed by these tactics, the product loses its appeal to the discounter as a "traffic-builder", but in the meantime the tendency of such activity is to drive the small neighborhood retailer out of business and to undermine the good will which the manufacturer has established in his trademarked product. The ultimate result is in-

evitably monopolistic, in that it tends to concentrate retailing into the hands of a numerically small group of giant retailers. This has already happened to a large extent in the food retailing business. (Whether these economically evil results are, from the standpoint of the public welfare, counter-balanced by the fact that, in theory and for a short period, the public gets lower prices in a limited number of outlets on certain trademarked goods is a question which has been answered in the negative by the Ohio General Assembly. For further amplification and support of these points as they were developed before the respective committees of the Legislature, see the Record for the transcript of those hearings.)

To prevent these things from happening and to save his good will, the manufacturer insisted in various ways that his resale price be maintained and entered into contracts with his distributors, the purpose of which was to require that such resale priees be maintained. With these contracts—known as resale price maintenance contracts—there was no objection at common law and they were repeatedly held to be valid under the common law. *Garst* v. *Harris*, 177 Mass. 72, 58 N.E. 174 (1900); *Garst* v. *Charles*, 187 Mass. 144, 72 N.E. 839 (1905); *Gragan* v. *Chafee*, 156 Cal. 611, 105 P. 745 (1909); *Commonwealth* v. *Grinstead*, 111 Ky. 203, 63 S.W. 427 (1901); *Walsh* v. *Dwight*, 40 App. Div. 513, 58 N.Y.S. 91 (1898). The English rule was the same. *Elliman, Sons & Co.* v. *Carrington & Son*, 2 Ch. Div. 275 (1901). See generally Callman, *Unfair Competition and Trademarks*, 2d Ed. (1950), Sec. 22.2.

The Ohio Fair Trade Act, while recognizing the existence of property rights in a trademark, does not actually create any new property rights. The Act merely recognizes these rights as a commercial fact of life, and creates statutory protection to the unfair infringement thereof.

Property rights in a tradename developed through advertising, promotion and good will have been recognized independently of and far before the existence of fair trade legislation. As noted by this Court in *Mishawaka R. & W. Mfg. Co.* v. *S. S. Kresge Co.*, 316 U.S. 203, 205 (1942):

> "The protection of trademarks is the law's recognition of the psychological function of symbols. If it is true that we live by symbols, it is no less true that we purchase goods by them. A trademark is a merchandising short-cut which induces a purchaser to select what he wants, or what he has been led to believe he wants. The owner of a mark exploits this human propensity by making every effort to impregnate the atmosphere of the market with the drawing power of a congenial symbol. Whatever the means employed, the aim is the same—to convey through the mark, in the minds of potential customers, the desirability of the commodity upon which it appears. Once this is attained, the trade-mark owner has something of value. If another poaches upon the commercial magnetism of the symbol he has created, the owner can obtain legal redress."

The fact that a trademark is intangible property does not detract from the principle that it is none-

theless property. As Mr. Justice Holmes said in *Beech-Nut Packing Company* v. *P. Lorillard Company*, 273 U.S. 629, 632 (1927):

> ". . . In a qualified sense the mark is property, protected and alienable, although as with other property its outline is shown only by the law of torts, of which the rights is a prophetic summary."

Further, a trademark owner retains his property rights in the mark even though he sells the goods to which the mark is attached. This Court noted in *Bourjois* v. *Katzel*, 260 U.S. 689, 692 (1923):

> "Ownership of the goods does not carry the right to sell them with a specific mark."

The Court went on to state the nature of the property rights in a trademark and said:

> "It deals with a delicate matter that may be of great value but that easily is destroyed and therefore should be protected with corresponding care."

The Ohio Legislature simply recognized what had been held by this Court in *Trade-Mark Cases,* 100 U.S. 82, 93 (1879)—that the protection of trademarks is a matter of state legislative concern, and stated:

> ". . . the property in trade-marks and the right to their exclusive use rest on the laws of the States, and, like the great body of the rights of person and of property, depend on them for security and protection . . ."

Action by the Legislature and the courts to safeguard the property rights in a trademark or tradename against unfair infringement as well as against imitation is sound public policy. As stated in *McLean v. Fleming,* 96 U.S. 245, 252 (1877):

> "Everywhere courts of justice proceed upon the ground that a party has a valuable interest in the good-will of his trade, and in the labels or trade-mark which he adopts to enlarge and perpetuate it. Hence it is held that he, as proprietor, is entitled to protection as against one who attempts to deprive him of the benefits resulting from the same, by using his labels and trade-mark without his consent and authority."

The foregoing principles are not unique to federal law. For example, in *Henry Furnace Co.* v. *Kappelman,* 91 Ohio App. 451, 458-59 (1952), the Court of appeals of Cuyahoga County said:

> "While courts in the early unfair competition cases enjoined a defendant who was passing off his goods as those of plaintiff, the Ohio case referred to, and other soundly based decisions, have enjoined acts of a defendant confusing or tending to deceive the public, *as well as acts indicating an effort to obtain a 'free ride' based on plaintiff's investment in his business and reputation.*" [Emphasis supplied.]

Thus, the Ohio Legislature acted on the basis of the economic evidence presented to it and in recognition of the fact that the economic problems resulted from the abuse and misuse of trademarks and tradenames in the sale of commodities. In this concept, the Legis-

lature found support in the long history recognizing the right of the property interest in a trademark or tradename to protection.

The Ohio General Assembly was far from the first legislative body to act in recognition of these economic arguments and on the basis of the property rights in a trademark or tradename. The McGuire Act and Miller-Tydings Amendment which grant the state legislatures the permission to enact fair trade legislation were themselves adopted as a result of the very same economic arguments and in recognition of the same property rights. Significantly, neither the Miller-Tydings Amendment nor the McGuire Act has ever been successfully attacked on constitutional grounds.

2. Contractual principles are used to establish the rights and obligations under the new Ohio Fair Trade Act between the trademark owner and the retailer.

In essence, the new Ohio Fair Trade Act provides that where trademarked products are in free and open competition with other commodities produced for sale at retail, the owner of the trademark or brand name applied to such commodities may condition the use of such trademark or brand name. To do this the trademark owner first "establishes" his fair trade prices by contract. In the instant case each of the manufacturers "established" their fair trade prices in Ohio by formal written contract. Once prices have been so established, the trademark owner may require any retailer who desires to obtain and sell such commodities at retail with the use of that trademark or

brand name to sell said products for at least the minimum prices established by the owner of the trademark or brand name. The retailer is *not* required to utilize a trademark owner's brand or name if he objects to such condition. In addition, no retailer can be bound by the provisions of the Ohio Fair Trade Act unless he has had notice of the conditions on the use of a given brand or name at the time he acquires the commodities. The Legislature has expressed an intention that the Fair Trade Act will have no operative effect unless the merchandise in question is in free and open competition with other commodities of the same class.

It is clear that, even under the Supreme Court's holding in the *Bargain Fair* case, *supra*, a written contract between manufacturer and retailer designed to establish minimum resale prices for a manufacturer's trademarked commodities is valid. The Legislature has now provided that where a trademark owner has first established his fair trade prices by formal contract, further contracts may arise between the trademark owner and other retailers, once notice is given to such other retailers. These subsequent "implied in law" contracts arise when the retailer, with notice, thereafter decides to acquire such trademarked goods and to employ the trademark in the sale of the commodities. The Legislature recognized nothing unusual or novel to the law in the establishment of a contract arising out of the acts between certain parties (in this case the manufacturer and the retailer).

If a person owns a piece of property, for example, a candy bar, he may enter into an agreement with an-

other person to sell that candy bar for five cents. A binding contract arises and the purchaser is obligated to pay the seller five cents. The seller may also place a sign on his candy bar saying, "For Sale—5 Cents". If another person then comes along, reads the notice, takes and eats the candy bar, he is equally obligated to pay the seller five cents. This result follows even if the candy-eater says to himself while enjoying the candy, "I intend to pay only three cents". The principle is the same whether the property interest transferred is a candy bar, a house, an exclusive franchise or license, or a trademark or tradename.

However, out of an abundance of caution, the Legislature went further. The discounter was given additional safeguards which ordinarily do not appear in a contractual relationship. The Legislature provided that a retailer might escape from the contract if he later regretted his bargain, even though he had decided to acquire a commodity having a given brand name with full knowledge of the conditions on the use of that brand name. To accomplish such rescission, the retailer can sell the commodity back to the manufacturer at the invoice price. In addition, the Legislature has provided that if the retailer decides not to take advantage of the manufacturer's tradename to assist him in reselling the goods, he may sell the commodity *qua commodity* at any price he chooses. In the candy bar analogy, the purchaser does not have these privileges.

The problem which really has faced the courts and legislatures has been to determine the proper allocation of competing property rights and interests under

the fair trade acts. Both the interest of the manufacturer in his trademark or tradename and the interest in the commodity itself must be considered.

The Legislature, in adopting the new Ohio Fair Trade Act along contractual lines, and the court in recognizing the validity of this concept have done nothing more than "make explicit what was suggested by this Court in *Old Dearborn Distributing Co.* v. *Seagram Distillers Corporation,* 299 U.S. 183 (1936). In the *Old Dearborn* case, Mr. Justice Sutherland stated at pages 193, 194:

> "Appellants here acquired the commodity in question with full knowledge of the then-existing restriction in respect of price which the producer and wholesale dealer had imposed, and, of course, with presumptive if not actual knowledge of the law which authorized the restrictions. *Appellants were not obliged to buy; and their voluntary acquisition of the property with such knowledge carried* with it, upon every principle of fair dealing, assent to the protective restriction, with consequent liability under § 2 of the law by which such acquisition was conditioned. Cf. *Provident Institution* v. *Jersy City,* 113 U.S. 506, 514-515; *Vreeland* v. *O'Neil,* 36 N.J. Eq. 399, 402; same case on appeal, 37 N.J. Eq. 574, 577.
>
> "We find *nothing in this situation to justify the contention that there is an unlawful delegation of power to private persons* to control the disposition of the property of others, such as was condemned in *Eubank* v. *Richmond,* 226 U.S. 137, 143; *Seattle Trust Co.* v. *Roberge,* 278 U.S. 116, 121-122; and *Carter* v. *Carter Coal Co.,* 298 U.S.

> 238, 311. In those cases the property affected had been acquired without any preexisting restriction in respect of its use or disposition. The imposition of the restriction *in invitum* was authorized after complete and unrestricted ownership had vested in the persons affected. Here, the restriction, already imposed with the knowledge of appellants, ran with the acquisition and conditioned it." [Emphasis supplied.]

Thus, this Court in *Old Dearborn* utilized ordinary contract principles to validate the Illinois Fair Trade Act against constitutional attack even though no specific contract between the retailer and the trademark owner was presented in the *Old Dearborn* case, and even though the Illinois Fair Trade Act did not work out the rights and obligations between the trademark owner and the so-called non-signing retailer on the basis of contract principles. The contractual relationship implied from the facts and before this Court in *Old Dearborn* is expressly set forth by the Ohio Legislature in the new Ohio Fair Trade Act. Further, the admitted facts disclosed by the record in this case contain every element found significant by this Court in *Old Dearborn*.

C. The Legal Recognition of the Economic Need for Fair Trade Legislation.

Legal recognition of the validity of the economic arguments in support of fair trade, and more importantly of the principle that the weighing of these arguments is a matter for the legislative bodies, is evidenced by numerous opinions of this Court and of state supreme courts. Notwithstanding that it is

twenty-eight years old, this Court's opinion in the *Old Dearborn* case, *supra,* stands to this day as the most comprehensive and penetrating examination of the legal basis for fair trade laws.

Surely the appellant in these cases will not suggest that this Court's approach to the economic question in the *Old Dearborn* case is open to dispute. This Court said at pages 195-196:

> "There is a great body of fact and opinion tending to show that price cutting by retail dealers is not only injurious to the good will and business of the producer and distributor of identified goods, but injurious to the general public as well. The evidence to that effect is voluminous; but it would serve no useful purpose to review the evidence or to enlarge further upon the subject. True, there is evidence, opinion and argument to the contrary; but it does not concern us to determine where the weight lies. We need say no more than that the question may be regarded as fairly open to differences of opinion. The legislation here in question proceeds upon the former and not the latter view; and the legislative determination in that respect, in the circumstances here disclosed, is conclusive so far as this court is concerned. Where the question of what the facts establish is a fairly-debatable one, we accept and carry into effect the opinion of the legislature. *Radice* v. *New York,* 264 U. S. 292, 294; *Zahn* v. *Board of Public Works,* 274 U.S. 325, 328, and cases cited."

The Ohio Supreme Court below took a similar view (R.U. 422):

> "When the general welfare of the small merchant is considered together with the necessity of protecting the goodwill and value attached to a trademark, it was clearly within the legislative power to enact such protective legislation, and the court will not substitute its judgment in this [fol. 483] instance for that of the General Assembly. . . ."

The decision of the Ohio Eighth Circuit Court of Appeals in the instant case, which was affirmed by the Supreme Court of Ohio, also contains a good summary of the conflicting economic ends which the Legislature had to weigh in deciding whether or not to enact a fair trade law. The Ohio Court of Appeals held (R.U. 400):

> "Without attempting to set out in detail the arguments for or against 'fair trade' laws, which now would serve no useful purpose, it might be well just to mention that those against 'fair trade' legislation argue that the public is entitled to the benefit of the economies enjoyed by savings in purchasing goods at lower prices from cut-rate establishments, while, on the other hand, the proponents assert that the need to save the local small merchant, who not only sells merchandise in competition with all others but also renders service, is absolutely essential in many cases to the health and welfare of the community. It is claimed that price-cutting survives on the desire of the public to purchase known brands, this desire having been created by the manufacturer's

sales efforts on the consumer level. In other words, the price-cutter capitalizes on the goodwill of the manufacturer. The claim that fixing retail prices by the manufacturer under the Fair Trade Acts deprives the consumer of the benefits of competition is met by the claim that his goods must be sold in competition with other goods of the same class [fol. 458] under Fair Trade Acts, which fact assures the public of all reasonable benefits of competition. However, as just stated, this is a question of fact for legislative determination."

Even before the advent of fair trade legislation, Justice Oliver Wendell Holmes of this Court recognized the economic evil of price-cutting when he said, in his dissenting opinion in *Dr. Miles Medical Company* v. *John D. Parks & Sons Co.*, 220 U.S. 373, 412:

> ". . . I think that we greatly exaggerate the value and importance to the public of competition in the production or distribution of an article (here it is only distribution), as fixing a fair price. What really fixes that is the competition of the conflicting desires. . . . As soon as the price of something that we want goes [fol. 444] above the point at which we are willing to give up other things to have that, we cease to buy it and buy something else. . . . The Dr. Miles Medical Company knows better than we do what will enable it to do the best business. We must assume its retail price to be reasonable, for it is so alleged and the case is here on demurrer; so I see nothing to warrant my assuming that the public will not be served best by the company being

allowed to carry out its plan. I cannot believe that in the long run the public will profit by this court permitting knaves to cut reasonable prices for some ulterior purpose of their own and thus to impair, if not to destroy, the production and sale of articles which it is assumed to be desirable that the public should be able to get."

The dispute with respect to the economic wisdom and social justification for fair trade legislation is still a matter of controversy. Professor Davidson, of Ohio State University, offers the following opinion (R.U. 118):

> "Although there is a recognized controversy in ecnomic theory as to the effects and social desirability of fair trade legislation, there are sound economic arguments in favor of such legislation, depending upon the social aims which the legislature is most desirous of furthering."

However, this Court and the Ohio court below have taken the position that questions of economic wisdom and social desirability are not matters addressed to the United States Constitution and that the United States Constitution does not require or permit the courts to determine these questions. As Mr. Justice White said in the recently decided case *Ungar* v. *Sarafite,* — U.S. —, 32 LW 4276 at 4281 (1964). "But because something is arguable does not make it unconstitutional." This conclusion is hardly assailable.

D. The Attempt to Attack State Fair Trade Laws as a Violation of the Fourteenth Amendment.

In considering the appellant's shotgun attack on the Ohio Fair Trade Act, it is well to remember the cautionary note struck by Mr. Justice Sutherland when he embarked upon consideration of the same arguments in the *Old Dearborn* case, *supra.* He said, at pages 190-191:

> "It is not without significance that while the proposed legislation was vigorously assailed in other respects, we do not find that any constitutional objection was urged. And the decisions of this court, far from suggesting any constitutional infirmity in such proposed legislation, contain implications to the contrary."

In fact, this Court went even further in the *Old Dearborn* opinion and forthrightly acknowledged the fact that by its own prior opinions it had invited legislation to deal with the economic and social problems that the state fair trade laws seek to solve. This Court said at page 191:

> "While these observations of this court cannot, of course, be regarded as decisive of the question, they plainly imply that the court at the time foresaw no valid constitutional objection to such legislation, for it cannot be supposed that the court would suggest a legislative remedy the validity of which might seem open to doubt."

Each of the arguments actually made by the appellant herein to the Supreme Court of Ohio were

made in the same, identical fashion to this Court in the *Old Dearborn* case. In both instances, a prime effort was made to convince the Court that the fair trade law involved a delegation of legislative authority, violation of the due process and of the stated police power.

(a) Delegation of Authority.

The short answer to the argument that the imposition of such restriction involves a delegation of legislative authority is made by this Court in *Old Dearborn* at pages 193-194, quoted here in full at pages 42 and 43, *supra*.

Upon analysis of the provisions of the Ohio Fair Trade Act and the facts of the case presently before this Court, there is simply no reason to alter the analysis or disposition made by this Court in the *Old Dearborn* case. Even a cursory examination of the facts of this case as against the Ohio law reveals that the reasoning of the Court in *Old Dearborn* is equally applicable to the instant case. In this case, it was not only proved that the appellant acquired the appellee's trademarked commodity with notice of the condition upon its use, but this fact was judicially admitted by the appellant in its pleadings. In its second amended petition, appellant states (R.U. 9):

> "Plaintiff has acquired the commodities bearing the defendant's trade names, trade marks and brand names after receiving notice of defendant's established minimum resale prices. Following receipt of such notice the plaintiff has sold, offered for sale and advertised for sale these com-

modities produced by defendant at prices lower than the minimum resale prices provided in such notice."

Thus, by its own pleading, appellant brings itself squarely within the fact pattern before this Court in *Old Dearborn.*

In considering the facts of this case and the new law, Judge Griffith of the Ohio Supreme Court noted (R.U. 418):

"It must be remembered that there is no compulsion on a retailer to handle the trade-marked goods. Since the act applies only to goods which are in free and open competition with goods of the same nature, he may select other goods for sale. If he selects the fair-trade goods, it is his voluntary act, and he must abide by the conditions imposed thereon by the proprietor. The fact that he may not like the conditions is inconsequential. Most of us are forced by circumstances to enter into contracts where we do not like the conditions imposed on us, yet if we voluntarily accept the merchandise we must abide by the conditions attached thereto. For example, in purchasing a home, there are in most instances restrictive covenants as to use. We may not like such conditions, but if we accept the contract we must abide thereby. Liking or not liking the conditions of acquiring property has no effect on the validity of the contract. If the retailer chooses to accept the goods, he is bound by the conditions imposed thereon, in this instance, the fair trade price."

Judge Griffith went on to cite as direct authority for this proposition the court's reasoning from the *Old Dearborn* case. The logic and validity of these observations is equally as pertinent now as it was in 1936. This is emphasized by the fact that the appellant, with the benefit of these intervening years to construct and improve its argument, still makes the very same contentions that were made to this Court by the discounter in 1936.

(b) Abuse of the Police Power in Violation of Appellant's Rights Without Due Process of Law.

The further alleged constitutional question of whether the Fair Trade Act falls within the ambit of the state's police power or constitutes a violation of the due process clause of the Fourteenth Amendment is also adequately disposed of in *Old Dearborn* The prime answer to these arguments lies in the fact that there is sufficient economic and social justification for fair trade legislation to make the need for these laws a matter of legislative rather than judicial decision. This point has already been fully discussed in this brief. Secondly, because of the contract principle approach adopted in the Ohio Fair Trade Act, ~~it is clear~~ that no retailer's rights are affected in any respect whatsoever unless he enters into the use of trademarks or tradenames in selling merchandise with full knowledge of the condition on such usage. So that the retailer is completely protected, it is a requirement that the notice of the condition on the use of a trademark or tradename must be furnished to the retailer prior to the time that the retailer acquires the commodity which he expects to sell with the aid of the mark.

Finally, the restrictive provisions of the Ohio Fair Trade Act are limited to the use of the trademark itself. Thus, as noted by this Court in *Old Dearborn* at page 195:

> "The ownership of the good will, we repeat, remains unchanged, notwithstanding the commodity has been parted with. Section 2 of the act does not prevent a purchaser of the commodity bearing the mark from selling the commodity alone at any price he pleases. It interferes only when he sells with the aid of the good will of the vendor; and it interferes then only to protect that good will against injury. It proceeds upon the theory that the sale of identified goods at less than the price fixed by the owner of the mark or brand is an assault upon the good will, and constitutes what the statute denominates 'unfair competition'. See *Liberty Warehouse Co.* v. *Burley Tobacco Growers Assn.* 276 U.S. 71, 91-92, 96-97. There is nothing in the act to preclude the purchaser from removing the mark or brand from the commodity—thus separating the physical property of another—and then selling the commodity at his own price, provided he can do so without utilizing the good will of the latter as an aid to that end."

The Ohio Supreme Court below came to an identical conclusion with respect to the contentions that the law violates due process or exceeds the state's police power when it held (R.U. 416):

> "In this the opponents of this legislation fail to take into consideration that all ownership of property and the incidents relating thereto arise

only as a matter of law. *Inasmuch as all ownership of property arises only by law, the law may also impose such reasonable conditions and incidents of ownership as are necessary to protect not only the owner but the public in general, i.e., such conditions as are necessary for the general welfare.* Many such conditions are imposed by law. For example, land may be conveyed only by following the procedure prescribed by statutes, motor vehicles may be transferred only by certificate of title and it is only because the law so provides that property may be transmitted by will. It is fundamental that property may be used only so long as its use does not interfere with the public welfare." [Emphasis supplied.]

Accordingly, none of the appellant's efforts to invalidate the Ohio Act as a violation of the Fourteenth Amendment carry any greater weight today than they did when addressed to this Court in the *Old Dearborn* case.

E. Some Courts Have Superimposed Their Own Legislative Judgment in Evaluating the Wisdom of Fair Trade Legislation.

While it is clear that this Court in the *Old Dearborn* case staked out an approach which would leave to the various state legislatures the question of weighing the economic arguments and determining the wisdom in the regulation of state fair trade legislation, a number of state supreme courts have refused to follow the lead suggested by this Court. No useful purpose would be served by an exhaustive examination of each and every opinion by a state supreme court

in construction of the validity of the fair trade laws of its state. Certain observations, however, may be helpful.

It should first be noted that those states which have validated their own fair trade laws are primarily the states having the greatest commercial concentration generally recognized as having courts more attuned to the needs of a bristling market place and the public welfare of all. Included among the states which have validated their working fair trade laws are New York, Massachusetts, California, Illinois, Delaware, Connecticut, New Jersey, Maryland, North Carolina, Virginia and Wisconsin. (See chart of state fair trade laws, Vol. 2, CCH Trade Regulation Reporter, para. 6041.)

The decisions in the states which have invalidated their fair trade laws consist of cases where the state supreme court simply does not approve of the fair trade law and thus arrogates to itself the legislative power to strike it down. For example, in *Sterling Drug Co., Inc.* v. *Eckerd's of Tampa, Inc.*, 71 So. 2d 156, the Florida Supreme Court pointed out:

> "This court has expressed its views on fair trade and similar acts and has consistently and unequivocally rejected, on constitutional grounds, both the underlying theory and the economic fads on which they are sought to be predicated."

Similarly, the Georgia Supreme Court, in *Cox* v. *General Electric Co.*, 211 Ga. 286, 85 S.E.2d 514, expressed its view:

> ". . . We are convinced that any findings of fact

in conflict with what has been held in this opinion would be an attempt by the General Assembly to find a fact that does not exist, and of course, no court is bound by that sort of finding of fact by a legislative body. Of course, a manufacturer has a property right in his trade mark and trade name, but that does not give to him the right and power to strike down the Constitution of this State and interfere with the freedom of the right to contract."

The Supreme Court of Oregon, in striking down the Oregon Fair Trade Law in *General Electric Co.* v. *Wahle*, 296 P. 2d, 635, said:

"Viewed from a realistic standpoint, it is difficult to find any justification for the Fair Trade Act based upon considerations of the public health, safety, morals and welfare. We can see no real and substantial connection between the nebulous theory that fixed minimum resale prices are necessary to protect the good will of the trademark owner and the welfare of the public."

The Oregon court made its own analysis of what the legislature's real purpose was in enacting its fair trade act. It said:

"This is a suit in equity, and equity always regards the substance rather than the form. In substance, what is the real purporse of the Fair Trade Act? Regardless of how its true nature may be camouflaged by high-sounding terms such as 'free and open competition', 'unfair competition', 'protection of good will', etc. it is a matter of common knowledge that it is a price-fixing statute

> designed principally to destroy competition at the retail level. Protection of the 'good will' of the trademark owner is simply an excuse and not a reason for the law."

The decision under the old Fair Trade Act by the Ohio Supreme Court in *Union Carbide & Carbon Corp.* v. *Bargain Fair, Inc., supra,* and by the dissenting opinion of the Ohio Supreme Court in the instant case, fell into the same mold (R.U. 424). The latter opinion labels the new Ohio Fair Trade Act as an attempt to arbitrarily bind nonsigners to price fixing contracts by artificial and unauthorized legislative fiat. The entire opinion consists of fourteen lines and concludes that the reasons for the holding are the same as those which were expressed in holding the fair trade act unconstitutional in the *Union Carbide & Carbon Corp.* case.

Examination of the *Union Carbide* case reveals no elaboration on the reason for holding the Ohio Fair Trade Act unconstitutional. The court therein simply stated that a majority of its members reached the conclusion that Section 133.07 of the Revised Code "is unreasonable and unenforceable and constitutes an unauthorized exercise of the police power in that there is no substantial relation to the public safety, morals or general welfare." The court went on to state at 167 Ohio St. 186:

> "Moreover, it contravenes the 'due process' provision of the Ohio Bill of Rights by arbitrarily and monopolistically denying a seller, who has not entered into any price-fixing contract with the manufacturer, the privilege of disposing of his

> own property on terms of his own choosing, and in addition delegates legislative power and discretion to private persons."

Neither the Ohio court nor the other courts that have relied on these same constitutional objections have stated in what way the law delegates *legislative* authority or in what way the law violates either the due process clause or police power limitations. Attempts to create reasoning for the latter two contentions have led the courts into the clearest sort of political fact finding.

In direct contrast to the above cases, compare the views of this court in *Ferguson* v. *Skrupa*, 372 U.S. 726 at 730-31 (1963):

> "The doctrine that prevailed in *Lochner, Coppage, Adkins, Burns,* and like cases—that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely—has long since been discarded. We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws. As this Court stated in a unanimous opinion in 1941, 'We are not concerned . . . with the wisdom, need, or appropriateness of the legislation.' [citation omitted] Legislative bodies have broad scope to experiment with economic problems, and this Court does not sit to 'subject the State to an intolerable supervision hostile to the basic principles of our Government and wholly beyond the protection which the general clause of the Fourteenth

Amendment was intended to secure.' [citation omitted] It is now settled that States 'have power to legislate against what are found to be injurious practices in their internal commercial and business affairs, so long as their laws do not run afoul of some specific federal constitutional prohibition, or of some valid federal law.' [citation omitted]"

F. Fair Trade Is Not Unlawful Price-Fixing.

Those supreme courts which have invalidated their state fair trade legislation, some law review writers and virtually all lawyers in their briefs in opposition to fair trade laws, have characterized fair trade acts as "price fixing legislation." Similarly, this label is hung upon the fair trade law with the idea that by magic this creates a constitutional objection to the law. While it is true that in antitrust cases the term "price fixing" has gained an unfavorable connotation, a statute must be judged on its own provisions and what it accomplishes rather than by label. It must be remembered that price fixing is in itself no constitutional violation, but is made a violation of the law by reason of the enactment of state and federal antitrust laws by the United States Congress and state legislatures. With respect to fair trade laws, the United States Congress has specifically exempted these enactments from the federal antitrust laws. Obviously both the McGuire Act and the Miller-Tydings Amendment are themselves a part of the federal antitrust laws.

Accordingly, fair trade opponents do not come close to demonstrating constitutional defect in any state fair trade act merely by decrying it as price fixing legislation.

Further, an examination of the provisions of the Ohio law, as well as other state fair trade acts, reveals that this legislation comes nowhere near fixing the price of commodities by legislative fiat as suggested by fair trade opponents.

In the first instance, the act can only take effect with respect to commodities which are in free and open competition. If this condition does not exist there is no statutory fair trade remedy.

Secondly, the Ohio Fair Trade Act simply permits the owner of a trademark or tradename to establish the price or condition upon which his own property (i.e., the trademark or tradename) may be used by another. While it may be said that the manufacturer does set the price or condition on the use of his own trademark or tradename (which the retailer is free to take or leave as he chooses), this is not any different than the situation which exists when Macy's sets the price of an electric sweeper which its customers are free to buy if they wish. It is perhaps literally correct to say that Macy's is "price-fixing" its sweepers when it charges $39.95 for them. Surely no one would suggest, however, that so describing the transaction makes it unconstitutional, nor would anyone suggest constitutional questions in the enactment of legislation that would permit retailers to set or fix the price of the commodities they sell.

Judge Griffith, in the opinion of the Ohio court below, goes to the very heart of the argument by label advanced by discounters who feel that they have established constitutional invalidity of fair trade legislation merely by branding it as a "price fixing" law. He states (R.U. 423):

> "In the first place, this is not price fixing as commonly understood in the law. Here we have the producer of a commodity, which is in free and open competition with other goods of the same nature, fixing the price only of his own commodity; and not a fixing of prices for all the commodities in the same field. Here if a producer fixes his prices too high, the consumer will turn to other producers for his needs.
>
> "Second, this is not legislative price fixing but price maintenance contracts between the producer and retailer, and the fact that such a contract may in some instances be implied does not affect the validity of the act. We have already found that such contracts are valid. Thus, this contention is not well founded."

Naturally, it is the prerogative of any person or group whose business interests are not served by a particular piece of legislation to attack such legislation on constitutional grounds. It is the counter responsibility of the courts, however, to find substance to these constitutional attacks before striking down the legislation. Real substance is not found where the court merely disagrees with the wisdom of the enactment of legislation or where the court simply states that the law is unconstitutional on this or that

ground without any reason, or where an epithet is directed to the legislation in question.

G. The Ohio Fair Trade Act Is Within the Ambit of the McGuire Act

One of the major points relied upon by appellant is that the Ohio Fair Trade Act of 1959 is not exempted from the operation of the Federal Antitrust Laws by the federal enabling acts, Miller-Tydings and McGuire. In the light of the specific provisions of the Ohio Fair Trade Act, as compared to the specific provisions of the McGuire Act, this argument is wholly without merit. A mere reading of the McGuire Act makes it clear that the Ohio Fair Trade Act as applied to the facts of this case is clearly within the literal terms of the McGuire Act.

However, it should be also noted that this argument, as advanced by appellant, involves a logical dilemma as it tends to "prove too much". For to the extent that the "contracts" under the Ohio Act are not within the ambit of McGuire, to that same extent they are also outside the scope of the Sherman Act. In effect appellant urges the Court to engage in inconsistent constructions of the same statutory language in the same case, and hold that what the Ohio Fair Trade Act authorizes are not contracts for McGuire Act purposes but are contracts for Sherman Act purposes. Logic and intellectual integrity do not permit such a construction.

Conclusion

Fair trade legislation in this country has had a long and turbulent history. It has been the purpose of this brief to lay before the Court the economic and social nature of the problem which the Ohio Legislature sought to solve in the enactment of its 1959 Fair Trade Act.

The evidence in this record shows beyond all doubt that the Ohio Legislature felt compelled to move against the practices of the retail discounter who capitalizes upon a manufacturer's trademark or tradename in order to establish a competitive strangle hold in the retail market over smaller and usually independent merchants whose chief assets are service to the public and convenience to the consumer.

The Ohio Legislature was convinced that the capitalization on the proprietary interest in a trademark or tradename was a chief weapon in the discounter's arsenal. As a matter of law, there can be no dispute that the proprietor of a trademark or tradename does possess property rights in the mark or name itself and that these property rights continue to exist even though the commodity with which the mark is usually associated falls into the hands of other parties. In enacting the 1959 Fair Trade Act, however, the Ohio Legislature took pains to safeguard the rights of the discounter as well as to protect the small merchant, the consumer and the proprietor of a trademark or tradename. This the Legislature did by spelling out in terms of a contract the rights and obligations of both the manufacturer and the retailer in the use of the manufacturer's trademark or tradename and the

sale of commodities bearing such names. The law is so drawn that no obligation falls upon the retailer unless a relationship with the manufacturer's trademark or tradename is from the very beginning grounded upon a full appreciation by the retailer of the conditions and obligations he assumes when he decides to make use of the manufacturer's trademark or tradename in the sale of commodities.

In the 1959 enactment, the Ohio Legislature took advantage of the experience of some 44 other states in the enactment of their state fair trade laws and drew a statute based upon contractual principles and carrying safeguards and refinements not provided in the other state laws. The provisions of the new Ohio Fair Trade Act also introduce into the law the detailed requirements set forth by this Court in the *Old Dearborn* case, *supra*. What was implied by this Court from the Illinois statute in order to reach the conclusion this Court did in *Old Dearborn* is specifically set forth in the Ohio Act.

While the appellant sought to intrigue this Court with a Jurisdictional Statement inviting attention to a number of interesting federal questions, an examination of the briefs in chief filed by counsel for both appellees demonstrates that upon close analysis there is no substance to any of the matters which appellant used to pique this Court's interest. Once the residue of the appellant's scattered arguments is swept away the instant cases come down to a basic determination of whether there is any reason advanced for altering the thinking and ruling of this Court in *Old Dearborn*. Appellant has advanced no argument that is persuasive toward achieving this result. If anything,

this Court itself has over the years made even more plain its position that it will not enter into a sterile discussion of the wisdom, need or appropriateness of state legislation. Nor is this Court inclined to substitute its social and economic beliefs for the judgment of state legislative bodies.

Accordingly, where the Ohio Legislature has acted on the basis of voluminous economic evidence and in accordance with the legal principles developed through the years regarding property rights in a trademark or a tradename and where the Ohio Legislature has adopted contract concepts to protect the respective interests of all parties concerned, it becomes apparent that the opinion of the Supreme Court of Ohio below correctly recognized that the new Ohio Fair Trade Act was entirely free from constitutional infirmity.

Respectfully submitted

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 490

HUDSON DISTRIBUTORS, INC.,
Appellant,

v.

ELI LILLY AND COMPANY,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO

BRIEF FOR THE APPELLEE

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April 8, 1964

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BRIEF FOR THE APPELLEE

Jurisdiction

This appeal should be dismissed for want of jurisdiction. The Ohio court proceedings have not resulted in any final judgment of the Ohio Supreme Court but are still pending; and none of the federal questions argued here by Appellant, Hudson Distributors, Inc. ("Hudson"), were properly raised in and decided by the Ohio Supreme Court.

The statute on which Hudson rests its claim of jurisdiction requires a final judgment of the highest state court and is therefore inapplicable. 28 U. S. C. § 1257(2) (1958). And even if a final judgment had been rendered by the Ohio Supreme Court, this Court

would lack jurisdiction because of the absence of any substantial federal question raised in and decided by that court. Both the raising of the question in the highest state court and a clear showing that it was decided by that court are jurisdictional prerequisites.

Questions Presented

Jurisdictional Questions

1. Whether the judgment of the Ohio Supreme Court lacks finality under 28 U. S. C. § 1257(2) (1958) because federal and non-federal factual and legal issues urged by Hudson here were not determined by that judgment and were reserved by the Ohio courts for determination in subsequent proceedings.

2. Whether any of the federal questions Hudson seeks to raise on this appeal were properly presented to and decided by the Ohio Supreme Court.

Questions on the Merits, If Reached*

1. Whether the provisions of the Ohio Act involved in the *McKesson* case question may properly be considered on this appeal since Lilly sells only to wholesalers and therefore does not compete with them.

---

* Hudson has listed five questions in its Notice of Appeal and Jurisdictional Statement. These questions are in substance as follows:

1. (a) Whether the provisions of the Ohio Fair Trade Act of 1959 (the "Ohio Act") authorizing a proprietor to establish minimum resale prices for wholesalers with whom it competes conflicts with § 5(a)(5) of the McGuire Act and § 1 of the Sherman Act under this Court's decision in *United States* v. *McKesson & Robbins, Inc.*, 351 U. S. 305 (1956) (the "*McKesson* case question").

   (b) Whether the Ohio Act authorizes a proprietor to require his distributors to enter into "horizontal" resale price agreements or boycott arrangements in conflict with § 5(a)(5) of the McGuire Act and § 1 of the Sherman Act (the "horizontal agreement question").

2. Whether provisions of the Ohio Act authorize fair trade agreements compelling distributors to enter into "horizontal" price fixing agreements or "boycott" arrangements in conflict with the McGuire Act and, if so, whether such provisions have any application to the facts of this case.

3. Whether the provisions of the Ohio Act pursuant to which Lilly established minimum resale prices by entering into written contracts with over 1,400 retailers and gave notice of the prices so established to other retailers in Ohio, including Hudson, conflict with the McGuire Act.

4. Whether the Ohio Act, as applied to the facts of this case, is constitutional under the due process clause of the Fourteenth Amendment to the United States Constitution.

Statutes Involved

In addition to the statutes cited at pages 3-4 of Hudson's Brief, the following provisions of 28 U. S. C. § 1257 (1958) are also involved in this case:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could

(c) Whether the Ohio Act authorizes the establishment of of minimum resale prices by notice without "the consensual agreement intended by Congress" in conflict with the McGuire Act and § 1 of the Sherman Act (the "notice question").

2. Whether the Ohio Act is unconstitutional under the due process clause of the Fourteenth Amendment to the United States Constitution (the "due process question").

3. Whether "the federally unconstitutional provisions" of the Ohio Act are severable (the "severability question").

For convenience of reference, these questions will sometimes be referred to by the parenthetical title appearing above at the end of each question.

be had, may be reviewed by the Supreme Court as follows:

* * * * *

"(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

Statement

Hudson is the owner and operator of a retail drug chain located in Cleveland, Ohio and is an affiliate of corporate operators of drug stores in other communities in Ohio (R. 19, 24). Appellee, Eli Lilly and Company ("Lilly") manufactures pharmaceutical products bearing its trade names and trade marks (R. 20).

Lilly sells its products directly to wholesalers and makes no sales to retailers (R. 19-20). Hudson concedes this (R. 19-20; Br. 14-15). Hudson purchases Lilly brand products from Regal D. S., Inc. ("Regal"), a wholesaler incorporated in the State of Michigan and located in the City of Detroit (R. 25). As Hudson describes Regal's business, Regal is "engaged in the sale of drugs and cosmetics to Hudson and other companies affiliated with Hudson" (Br. 15). Hudson is a wholly owned subsidiary of Regal. *Hudson Distributors, Inc.* v. *Eli Lilly and Co.*, 1963 Trade Cases ¶ 70,871 (Ct. of Common Pleas).

On January 22, 1958, the Ohio Supreme Court held the non-signer provisions of the Ohio Fair Trade Act of 1936 unconstitutional under the Ohio Constitution. *Union Carbide & Carbon Corp.* v. *Bargain Fair, Inc.*,

167 Ohio St. 182, 147 N. E. 2d 481 (1958). In June 1959, the Ohio Legislature, by overwhelming majorities in both houses enacted Ohio Revised Code Sections 1333.27-34 (the "Ohio Act"). The new act provided in part that the voluntary purchase of a trademarked commodity with knowledge of the trademark owner's fair trade price constituted a contract between such purchaser and the trademark owner not to resell the commodity at less than the fair trade price. The Ohio Act became effective on October 22, 1959.

On October 1, 1959, Lilly sent letters to all Ohio retailers, including Hudson, notifying them of Lilly's intention to establish minimum retail resale prices for its trademarked products pursuant to the Ohio Act, and inviting them to enter into written fair trade contracts with Lilly (R. 20-21). More than 1,400 Ohio retailers of Lilly's products (about 65% of all the retail pharmacists in Ohio) signed fair trade contracts with Lilly identical to the one set forth in Exhibit B to Lilly's Answer and Cross-Petition (R. 12, 34).

Hudson refused to enter into a written contract with Lilly and ignored the minimum resale prices which Lilly had established by such contracts pursuant to the Ohio Act (R. 22). However, Hudson continued to purchase and accept commodities produced by Lilly and identified by its trade names or trade marks (R. 22).

On December 10, 1959 and January 26, 1960, Lilly notified Hudson that the Ohio Act required Hudson to observe the minimum retail resale prices for Lilly commodities obtained by Hudson with notice of such minimum prices (R. 21). Nevertheless, Hudson con-

tinued to resell Lilly products at less than the minimum retail resale prices (R. 22).

On January 11, 1960, Hudson filed an Amended Petition (the "Petition"), which was the basis of the decisions below, in the Court of Common Pleas for Cuyahoga County for a declaratory judgment declaring the Ohio Act invalid in its application to Hudson (R. 1, 6-7).

In its Amended Petition, Hudson primarily urged the invalidity of the Ohio Act under the Ohio Constitution (R. 2-5). It also challenged the validity of various sections of the Ohio Act under the due process clause of the United States Constitution (R. 5-6). The only other federal questions raised were one relating to Section 1333.29(B) and two, later abandoned in the Ohio appellate courts and not raised in this Court, relating to Sections 1333.32(A) and 1333.32(B).*

---

* Hudson alleged that Section 1333.29(B), "which provides that after giving notice, the proprietor may require the distributor to sell at not less than the minimum resale price stipulated by the proprietor and may further require the distributor not to sell to any other distributor without first obtaining an agreement from such other distributor that he will not sell at prices less than the minimum resale prices stipulated by the proprietor", is contrary to and inconsistent with Sections 5(a)(2) and (3) of the McGuire Act in that the latter act only permits states "to enact legislation 'authorizing contracts or agreements prescribing minimum prices" (Petition, para. B.1; R. 5).

Hudson alleged that Section 1333.32(A), making it unlawful for one with notice to sell, offer or advertise for sale any fair traded commodity at less than the fair trade price conflicts with the McGuire Act in that the latter Act requires a non-signer to "act wilfully and knowingly" (Petition, para. B.2; R. 5). Paragraph B.3 of the Petition (R. 5-6) alleged that Section 1333.32(B), permitting suit by any person reasonably anticipating damage, "is contrary to and inconsistent with Section 5(a)(3) of the McGuire Act, in that, under the McGuire Act, suit may be brought only by a person actually damaged". These are the allegations abandoned by Hudson in the Ohio appellate courts and not raised in this Court.

On February 29, 1960, Lilly answered and cross-petitioned for enforcement of the Ohio Act against Hudson. The parties stipulated in open court that the question of the validity of the Ohio Act, raised by Hudson's Amended Petition, would be separated from the question of the enforcement of the Act, raised by Lilly's Answer and Cross-Petition, and tried first. Thereafter, the constitutional phase of the case was submitted on stipulated facts (R. 19-22).

The Court of Common Pleas held the Ohio Act unconstitutional under the Ohio Constitution, relying on *Union Carbide & Carbon Corp.* v. *Bargain Fair, Inc.*, 167 Ohio St. 182, 147 N. E. 2d 481 (1958). The sole basis for the decision was the Ohio Constitution and no other questions raised by the Amended Petition or Answer and Cross-Petition were discussed or decided.

On appeal, the Court of Appeals for Cuyahoga County reversed the trial court, holding that the Ohio Act was free of the infirmities found in the Ohio Fair Trade Act of 1936, and remanded the case "for further proceedings according to law with respect to the cross-petition . . ." (R. 43).

In its brief to the Court of Appeals for Cuyahoga County, Hudson focused primarily on the validity of the Ohio Act under the Ohio Constitution. The only federal issue raised by Hudson in its brief in the Court of Appeals related to the notice question. In its Petition for Rehearing, Hudson for the first time raised the *McKesson* case question. Hudson raised no federal due process question in the Court of Appeals

There was no reference in either the majority or minority opinions of the Court of Appeals to any federal question. The sole reference to any federal issue by the Court of Appeals was a recital in its judgment that the provisions of the Ohio Act

> "are declared to be valid, lawful and enforceable enactments of the Ohio General Assembly and not to be in violation of the Constitution of the State of Ohio or of the Constitution of the United States or of any law of the United States . . ." (R. 42).

On appeal, the Supreme Court of Ohio affirmed the judgment of the Court of Appeals for Cuyahoga County sustaining the constitutionality of the Ohio Act and remanding the case to the trial court for further proceedings on the Cross-Petition. As in the lower Ohio courts, Hudson's attack on the Ohio Act dealt mainly with the validity of the Act under the Ohio Constitution. The only federal issues raised by Hudson in its brief to the Ohio Supreme Court related to the notice question, the *McKesson* case question and the Federal Food, Drug and Cosmetic Act questions. However, in its reply brief to the Ohio Supreme Court, Hudson raised for the first time its horizontal agreement question and referred to paragraph 6 of Lilly's fair trade contract.* Again Hudson raised no federal due process question.**

---

* Paragraph 6 reads as follows: "Retailer agrees not to knowingly sell any of Manufacturer's 'Identified Commodities' to any dealer who fails to observe the minimum retail resale prices established under Paragraph 3 hereof" (R. 13).

** In its Petition for Rehearing to the Ohio Supreme Court, Hudson raised no federal questions.

In its opinion and judgment, the Supreme Court of Ohio made no reference to any federal question.

In its brief in this Court, Hudson seeks to raise the notice question, the *McKesson* case question and the horizontal agreement question. In addition, it resurrects the due process question abandoned below in both the Court of Appeals for Cuyahoga County and the Ohio Supreme Court. It argues, for the first time in the entire action, that the Ohio Act is invalid under the Lanham Act, 60 Stat. 427 (1946), 15 U. S. C. § 1051 *et seq.* (1958). It also argues that the Ohio Act is invalid under the Federal Food, Drug and Cosmetic Act, 52 Stat. 1040 (1938), 21 U. S. C. § 301 *et seq.* (1958), an issue referred to by Hudson below only in its brief in the Ohio Supreme Court and not mentioned by Hudson in either its Notice of Appeal or Jurisdictional Statement in this Court.

On the threshold question of this Court's jurisdiction, it is significant that all three decisions of the Ohio courts discussed only the state constitutional issues; that all three Ohio courts considered this case with the companion *Upjohn* case, No. 489, where, as in this case, the non-constitutional issues were reserved by stipulation for subsequent adjudication; and that all three Ohio courts dealt only with the facts and questions common to both the *Lilly* and *Upjohn* cases.*

* The trial court stated that the cases involved "the same questions" (R. 371). The Court of Appeals stated: "Both cases involve similar facts and, with the questions to be determined by this Court the same in each case, the appeals will be considered together" (R. 380). The Supreme Court stated that "[t]he facts in both cases are similar and the law applicable is the same" (R. 413).

To sum up, in its Amended Petition, Hudson raised the notice question (Hudson's Question 1(c) here) and the due process question (Hudson's Question 2 here). In the Court of Appeals, Hudson raised the notice question and the *McKesson* case question (Hudson's Question 1(a) here) but abandoned the due process question. In the Supreme Court, Hudson raised the notice, *McKesson* case and Federal Food, Drug and Cosmetic Act questions and for the first time in its reply brief raised the horizontal agreement question (Hudson's Question 1(b) here). In this Court, Hudson raises the notice, *McKesson* case and Federal Food, Drug and Cosmetic Act questions, seeks to revive the due process question and for the first time attempts to inject the Lanham Act question.

Not one of these federal questions was decided by any of the three Ohio courts. The trial court, finding the Ohio Act invalid under Ohio law, did not reach any federal question. Presumably for this reason, the Court of Appeals confined its opinion to questions of state law, made no reference to any federal question and remanded to the trial court.* The Ohio Supreme Court likewise discussed only state questions and affirmed the judgment of the Court of Appeals remanding the case to the trial court.

On remand, the parties proceeded with the enforcement phase of the proceedings, and Lilly obtained an injunction and award of damages against Hudson.

* The sole reference to the United States Constitution was the unexplained conclusory statement, in the Court of Appeals judgment, that the Ohio Act was not in violation of the United States Constitution or any law of the United States. This gives no clue as to whether that court focused on or found it necessary to decide any particular federal question.

In these enforcement proceedings, Hudson raised the following defenses by its Second Amended Answer to Lilly's Cross-Petition:

(1) Hudson did not wilfully resell at less than Lilly's fair trade prices;

(2) Lilly, a foreign corporation, was not properly licensed to transact business in the State of Ohio;

(3) paragraph 6 of Lilly's fair trade contract compelled retailers to enter into unlawful horizontal price fixing agreements in violation of Section 1 of the Sherman Anti-trust Act (readily identifiable as Hudson's "horizontal agreement question");

(4) Lilly was not uniformly enforcing its fair trade program on trade-marked commodities in Ohio; and

(5) Lilly modified its fair trade program by abandoning enforcement on its prescription products in Ohio.*

This award was vacated and set aside by the Court of Common Pleas, Cuyahoga County, and a new trial granted on allegations of disqualification of the trial judge. *Hudson Distributors, Inc.* v. *Eli Lilly and Co.*, 1963 Trade Cases ¶ 70,871 (Ct. of Common Pleas). Further proceedings have been stayed by the Court of Common Pleas pending the outcome of this appeal.

* The record of the enforcement proceedings, being subsequent to the Ohio Supreme Court decision appealed from, is of course not included in the record here. However, being a part of the same case, it should be judicially noticed by the Court. Hudson obviously will not deny having raised these defenses, and the full text of the pleading in which they were raised is set out in full in Appendix A hereto. Even if they had not actually been raised, it would be apparent to the Court that the remand would make it possible to raise them.

Appendix B hereto contains a tabulation of the questions urged by Hudson, showing the extent of Hudson's failure to raise the questions below, the absence of any decision below upon them, the extent to which they depend on unadjudicated interpretations of the Ohio Act, and their inapplicability in major instances to the facts of this case.

Summary of Argument

I.

The judgment of the Ohio Supreme Court is not a "final judgment" under 28 U. S. C. § 1257 (1958). Accordingly, this Court lacks jurisdiction. The trial court reserved for further proceedings, now pending on remand to the Court of Common Pleas, the enforcement of the Ohio Act against Hudson by Lilly. In those proceedings, Hudson itself asserts the right to raise, and has raised, federal and non-federal factual and legal questions not before this Court on this appeal, including at least one question, relating to the validity of paragraph 6 of the Lilly contract, which it now attempts to raise here. The Ohio Supreme Court's judgment is not the "effective determination of the litigation" required for appellate jurisdiction in this Court. *Market Street Railway Co.* v. *Railroad Commission,* 324 U. S. 548, 551 (1945).

II.

On appeal from a judgment of a state court, this Court has jurisdiction to decide only questions which were both raised and determined in the state court.

Alabama State Federation of Labor v. *McAdory,* 325 U. S. 450 (1945). None of the questions which Hudson attempts to raise on this appeal meets that test.

A.

The *McKesson* case question was not properly raised before, and was not decided by, the Ohio Supreme Court. Under Ohio law, it could not be raised on appeal since it had not been raised in the trial court.

B.

The horizontal agreement question also was neither properly raised before nor decided by the Ohio Supreme Court. Under Ohio law, it could not be raised in the Ohio Supreme Court because it had not been raised in either the trial court or the Court of Appeals. In addition, it is premised on interpretations of the Ohio Act not made by the Ohio Supreme Court. These relate to whether Section 1333.34 restricts Section 1333.29(B) and whether Section 1333.29(B) authorizes refusal-to-sell agreements with respect to interstate transactions. This Court will not supply its own interpretations of a state statute for the purpose of judging its validity. *Alabama State Federation of Labor* v. *McAdory,* 325 U. S. 450, 470 (1945).

C.

The notice question, premised on an interpretation of the Ohio Act as not requiring any written contracts, demands an interpretation which the Ohio courts were not required to, and did not, make in this case.

D.

The due process question was abandoned by Hudson in the Ohio appellate courts and cannot be revived

here. *Beck* v. *Washington,* 369 U. S. 541, 549-554 (1962); *Herndon* v. *Georgia,* 295 U. S. 441 (1935).

E.

The severability question is not a federal question.

F.

The Lanham Act and Federal Food, Drug and Cosmetic Act questions, not raised by Hudson in its Notice of Appeal or Jurisdictional Statement here, cannot be raised for the first time in Hudson's brief to this Court. Supreme Court Rules 10(2)(c), 15(1)(c)(1) and 40(1)(d)(2).

III.

The provisions of the Ohio Act applicable to the facts of this case are made fully applicable to interstate commerce by the McGuire Act.

A.

Lilly does not compete with its wholesalers. Consequently, this case does not involve any facts which could conceivably raise a question concerning the last sentence of Section 1333.29(A) of the Ohio Act, which authorizes a proprietor under certain circumstances to establish minimum resale prices for wholesale distributors with whom it competes. Hudson's hypothetical argument poses nothing for this Court to consider.

B.

The McGuire Act expressly authorizes fair trade agreements requiring the vendee in turn to obtain fair trade agreements from subsequent purchasers. This fully accommodates Subsection 29(B)(2) of the Ohio Act which contains the same authorization.

Hudson's attack on Subsection 29(B)(2) is wholly hypothetical. Lilly has not in fact required its vendees to obtain or agree to obtain fair trade agreements from others. Paragraph 6 of Lilly's fair trade con-

tracts, under which the retailer agrees not knowingly to sell Lilly commodities to any dealer who fails to observe Lilly's resale prices, does not require the retailer to enter into agreements with anyone. The Ohio courts have not been called upon to decide whether paragraph 6 is a permissible method of enforcement under Ohio law and if so whether the Ohio statute authorizes it as to interstate commerce or only intrastate commerce. Moreover, Hudson is neither bound nor affected by paragraph 6. Hudson makes no claim that anyone has refused to sell to it.

The Ohio courts, if presented with the question, might well hold that paragraph 6, whether or not specifically authorized by the Ohio Act, is a valid method of insuring fair and non-discriminatory observance of fair trade prices by those already lawfully obligated to observe them. If valid under Ohio law, it is exempted from the Federal antitrust laws by paragraph 3 of the McGuire Act as a right of enforcement of a state-created substantive right. All known retailers of Lilly products in Ohio have either entered into written fair trade contracts with Lilly or have been notified of the fair trade prices established by such contracts and are bound to observe them. Congress left to the states the selection of the methods of fair trade enforcement. The United States Constitution and the McGuire Act do not require Ohio to permit a retailer complying with the fair trade law to aid and abet its violation by others.

C.

Lilly established its resale price maintenance program in Ohio by entering into written fair trade contracts with over 1,400 retailers and thereafter

notifying all other known retailers in Ohio, including Hudson, of the written contracts and the resale prices. Under Ohio law, as embodied in the Ohio Act, Hudson's voluntary act of purchasing Lilly products for resale in Ohio, with notice from Lilly that it had established minimum resale prices, constituted a contract with Lilly to observe such prices.

The contract between Hudson and Lilly recognized by Ohio law is also a contract under paragraph 2 of the McGuire Act, which authorizes "any contracts" for resale price maintenance which are lawful "under any statute, law, or public policy now or hereafter in effect in any State."

Even if the term "any contracts or agreements" in paragraph 2 of the McGuire Act did not include the contract recognized by the Ohio Act as arising from the acts of the parties, paragraph 3 of the McGuire Act would sustain Lilly's enforcement of the resale price against Hudson. Lilly admittedly had express fair trade contracts with others and paragraph 3 independently exempts from the antitrust laws the enforcement of fair trade prices against persons having knowledge of the prices prescribed in such contracts.

The Ohio Act could be interpreted as requiring the establishment of resale prices by entering into at least one written contract. This interpretation would remove the premise of Hudson's argument that the Ohio Act is not authorized by the McGuire Act in that the state statute allows the establishment of resale prices by notice alone.

Even if the Ohio Act were interpreted as permitting the establishment of resale prices by notice alone, para-

graph 3 of the McGuire Act exempts from the Sherman Act the exercise and enforcement of rights and rights of action under such a state statute. In any event, the resale prices involved in this case were not established by notice alone but by hundreds of express contracts, and the question raised by Hudson is once again hypothetical.

D.

The Ohio Act safeguards the same interest of the trademark owner recognized in *Old Dearborn Distributing Co.* v. *Seagram-Distillers Corp.*, 299 U. S. 183 (1936) as an interest which the states might constitutionally protect through fair trade laws. Congress by the McGuire Act, which was enacted subsequent to the Lanham Act, specifically authorized state fair trade legislation to apply to interstate commerce.

E.

The Ohio Act provides that minimum resale prices are not applicable if no use is made of the proprietor's trademark or trade name. The Federal Food, Drug and Cosmetic Act permits Hudson to remove the manufacturer's labeling so long as Hudson places its own label on the drugs. Therefore, the Ohio Act in no way conflicts with the Federal Food, Drug and Cosmetic Act.

IV.

The unanimous decision of this Court in *Old Dearborn Distributing Co.* v. *Seagram-Distillers Corp.*, 299 U. S. 183 (1936) specifically considered and rejected an argument identical to Hudson's argument that the Ohio Act deprives it of property without due process of law in violation of the Fourteenth Amendment. *Old Dearborn* established that the United States Constitution

contains nothing to prevent a state from enacting a fair trade law permitting resale price maintenance enforceable against both contracting and non-contracting parties. Decisions as to the economic and social wisdom of a state statute are legislative, not judicial. *Ferguson* v. *Skrupa,* 372 U. S. 726 (1963).

V.

The question whether provisions of a state statute are severable has long been recognized to be a matter for the state courts to decide. *Skinner* v. *Oklahoma,* 316 U. S. 535 (1942); *Dorchy* v. *State of Kansas,* 264 U. S. 286 (1924).

ARGUMENT

I.

This Court lacks jurisdiction since the judgment appealed from is not final.

It is the burden of an appellant to demonstrate the jurisdiction of this Court to review on appeal a state court decision. *Memphis Natural Gas Co.* v. *Beeler,* 315 U. S. 649, 651 (1942). In this case Hudson cannot do so.

The statute on which Hudson relies for jurisdiction, 28 U. S. C. § 1257(2) (1958), requires that the appeal be from a judgment or decree of the highest court of a state which is "final". This Congressional requirement of finality is designed to assist in the maintenance of harmonious federal-state relationships. *Radio Station WOW, Inc.* v. *Johnson,* 326 U. S. 120, 124 (1945).

Accordingly, this Court refrains from interfering with state court proceedings by refusing to exercise its

jurisdiction until the state court has finally resolved all issues in the case. *Republic Gas Co.* v. *Oklahoma*, 334 U. S. 62, 67-69 (1948). The state court judgment "must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of a final court." *Market Street Railway Co.* v. *Railroad Commission*, 324 U. S. 548, 551 (1945).

Whether a state court judgment is final within the jurisdictional requirements of 28 U. S. C. § 1257 (1958) is for this Court to determine. *Cole* v. *Violette*, 319 U. S. 581, 582 (1943). The rule as to appeals from state court judgments is that complete and definitive disposition of all issues must have been made by the judgment being reviewed.* "[T]he requirement of finality has not been met merely because the major issues in a case have been decided and only a few loose ends remain to be tied up—for example, where liability has been determined and all that needs to be adjudicated is the amount of damages." *Republic Gas Co.* v. *Oklahoma*, 334 U. S. 62, 68 (1948). *Accord, Gospel Army* v. *Los Angeles*, 331 U. S. 543 (1947).

In cases where the state court judgment contemplates further discretionary proceedings at the trial court level, the judgment is not final and is not reviewable by this Court. A clear example of this type of

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* The finality rule as applied to appeals from state courts must be distinguished from the rules applicable to appeals from federal courts. Generally, there is no requirement of finality in appeals to this Court from federal courts (see, *e.g.*, 28 U. S. C. §§ 1252, 1253, 1254, 1255, 1256 (1958) and, even in cases where finality is required, the requirement is significantly less strict than in appeals from state courts. Boskey, *Finality of State Court Judgments Under the Federal Judicial Code*, 43 Col. L. Rev. 1002, 1003 (1943).

judgment is one which orders a new trial, since issues not raised by the original pleadings can then be presented. *Gospel Army* v. *Los Angeles*, 331 U. S. 543 (1947). Only in cases where the further proceedings contemplated involve mere ministerial acts, such as entry of a judgment by the lower court, is the decree regarded as final. *Pope* v. *Atlantic Coast Line R. Co.*, 345 U. S. 379, 382 (1953); *Department of Banking* v. *Pink*, 317 U. S. 264 (1942). In the present case, the remand by the Ohio Supreme Court to the trial court for further proceedings clearly deprives this Court of jurisdiction. *Southern Pacific Co.* v. *Gileo*, 351 U. S. 493 (1956). The proceedings on remand are still pending. Far from involving mere ministerial acts, these proceedings have involved amendments to pleadings, the taking of additional evidence, and submission of briefs.

As a result of these further remand proceedings, it would be possible for the litigation to terminate without any necessity of ever deciding a constitutional question. For example, Hudson is now contending in the remand proceedings that its violation of the fair trade prices was not willful, as required by the McGuire Act, 66 Stat. 632 (1952), 15 U. S. C. § 45(a)(1)-(5) (1958); that Lilly lacks standing to sue for want of qualification in Ohio as a foreign corporation; that Lilly has waived its right to enforce fair trade prices against Hudson because of its failure to enforce them against others; and that Lilly has in effect abandoned its fair trade program in Ohio (see Appendix A hereto). And, of course, amendment by Hudson of its pleadings in the pending enforcement proceedings could bring in

still further non-federal issues, factual or legal. *Republic Gas Co.* v. *Oklahoma,* 334 U. S. 62 (1948); *Gospel Army* v. *Los Angeles,* 331 U. S. 543 (1947).

In addition, Hudson is raising in the remand proceedings one of the constitutional questions which it most insistently urges in this Court and which was not passed upon in the earlier proceedings in the Ohio courts. This question relates to paragraph 6 of the Lilly Manufacturer-Retailer Contract (see p. 11, *supra*).

Hudson also urges in its brief to this Court supposed constitutional questions relating to the Federal Lanham Act and the Federal Food, Drug and Cosmetic Act. Hudson has not yet raised these points in the remand proceedings; but, judging from its raising of the paragraph 6 issue in those proceedings, it may well do so before the remand proceedings are over.

As will be shown in II below, these and other constitutional questions urged by Hudson here are not before the Court because not properly presented to and decided by the Ohio courts in the proceedings below. In the present state of the record, this Court cannot even dispose of all the federal questions on which Hudson seeks a determination, much less the additional questions which might develop in the remand proceedings and which might themselves be dispositive of the litigation. Hudson is thus requesting of this Court a piece-meal interference with state court proceedings which are still far from final judgment.

Never in the history of this Court, so far as counsel have been able to discover, has this Court ever entertained an appeal under 28 U. S. C. § 1257(2) (1958) under the circumstances presented here.

II.

None of the federal questions urged by Hudson in this Court were properly presented to and decided by the Ohio Supreme Court.

Under the settled practice of this Court, jurisdiction to determine the federal constitutionality of a state statute is not recognized until the courts of the state have first had an opportunity to pass upon the statute's constitutionality and have done so. *Adler* v. *Board of Education,* 342 U. S. 485, 496 (1952); *Alabama State Federation of Labor* v. *McAdory,* 325 U. S. 450 (1945). Time and again, this Court has pointed out that review by it of state court decisions is limited to specific federal constitutional questions, raised and preserved according to state procedure and passed upon. Unless the constitutional questions which Hudson now urges on this appeal were so raised and preserved, and expressly or necessarily decided by the Ohio Supreme Court, basic jurisdictional requisites are lacking in this Court. *Adler* v. *Board of Education, supra; Radio Station WOW, Inc.* v. *Johnson,* 326 U. S. 120, 128 (1945); *Murdock* v. *City of Memphis,* 87 U. S. 590 (1875).*

* It is elementary that the noting of "probable jurisdiction" is no impediment to dismissal if jurisdiction is subsequently shown to be lacking. The policy against premature constitutional adjudications demands that all doubts as to jurisdiction be resolved against appellants. *Republic Gas Co.* v. *Oklahoma,* 334 U. S. 62, 71 (1948).

The Rules of this Court specify with great particularity the showing required by an appellant to meet these jurisdictional tests where the appeal is from a state court. Under subdivision 1(d) of Rule 15, the appellant must

> "specify the stage in the proceedings in the court of first instance, and in the appellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised; the method of raising them (e.g., by a pleading, by request to charge and exceptions, by assignment of error); and the way in which they were passed upon by the court; with such pertinent quotations of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears (e.g., ruling on exception, portion of the court's charge and exception thereto, assignment of error) as will support the assertion that the rulings of the court were of a nature to bring the case within the statutory provision believed to confer jurisdiction on this court."

These requirements were ignored by Hudson both in its Jurisdictional Statement and in its Brief. It did not and cannot meet the requirements of Rule 15.*

It is beyond dispute that the Ohio courts did not expressly decide any federal question. Although all three courts below wrote lengthy opinions, not a word

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* Briefs and oral arguments before state courts are not part of the record filed in this Court and cannot be used to establish that a federal question has been raised and preserved below. See, *Live Oak Water Users' Association* v. *Railroad Commission*, 269 U. S. 354 (1926). We have, however, analyzed the briefs in the Ohio courts and they establish the contrary as to the federal questions Hudson attempts to raise here.

relating to the federal questions is found in any of them. The only reference to the federal constitutionality of the Ohio Act by any of the Ohio courts is a 17 word conclusory statement in the judgment of the Cuyahoga County Court of Appeals that the Ohio Act is not "in violation . . . of the Constitution of the United States or of any law of the United States" (R. 42). Such a statement gives this Court no way of knowing whether even the intermediate Ohio Court addressed itself to, or found it necessary to decide, any particular federal question. If such a statement conferred jurisdiction on this Court, it could only be jurisdiction to roam through the entire Constitution and all the laws of the United States in quest of any provision which might be violated. Hudson concedes that no federal question was "reached" or "passed upon" by the Court of Common Pleas of Cuyahoga County and that the Court of Appeals for Cuyahoga County and the Ohio Supreme Court did not consider or discuss any federal questions in their opinions* (Jur. State. 2, 7-8; Br. 2-3).

As a question-by-question analysis readily demonstrates, the federal questions which Hudson now attempts to raise either were not raised below at all, are not presented by the facts of this case, or were abandoned or reserved in the course of the Ohio proceed-

* In its Brief in this Court (p. 2), Hudson has partially shifted ground, so far as the Court of Appeals is concerned, by claiming that "the federal constitutional issues raised by Hudson were disposed of by reliance upon *Standard Drug Company, Inc.* v. *General Electric Company*, 202 Va. 367, 117 S. E. (2d) 289 (1960) *app. dismissed*, 368 U. S. 4 (1961)." However, it is clear from the opinion of the Court of Appeals that the *Standard* case was relied upon only in connection with state constitutional issues raised by Hudson.

ings, and none of them were passed upon by the Ohio Supreme Court.

A. The *McKesson* Case Question (Hudson's Question 1(a)).

The *McKesson* case question was neither raised in the Court of Common Pleas for Cuyahoga County nor in Hudson's briefs as appellee in the Cuyahoga County Court of Appeals. Only after the Court of Appeals reversed the judgment of the Court of Common Pleas did Hudson first raise the question in its Petition for Rehearing to the Court of Appeals (R. 40).

Under Ohio procedure, failure to raise a federal constitutional question in the trial court bars its consideration on appeal. *City of Columbus* v. *Ewing,* 77 Ohio L. Abs. 31, 148 N. E. 2d 95 (Ct. of App. 1957); *State ex rel. McKay* v. *Board of Elections of Montgomery County,* 65 Ohio L. Abs. 547, 115 N. E. 2d 858 (Ct. of App. 1953). Since the question was not timely raised and not considered by the Ohio appellate courts, it cannot be considered by this Court. *Stembridge* v. *Georgia,* 343 U. S. 541, 547 (1952); *C. I. O.* v. *McAdory,* 325 U. S. 472, 477 (1945).

In any event, as discussed in III below (see pp. 34-35), the *McKesson* case question is wholly hypothetical since Lilly sells only to wholesalers with whom it does not compete (R. 19-20).

B. The Horizontal Agreement Question (Hudson's Question 1(b)).

In this Court, Hudson apparently claims that Section 1333.29(B) of the Ohio Act conflicts with paragraph 5 of the McGuire Act in two respects. First, it

argues that Section 1333.29(B) authorizes a proprietor to compel its distributors to enter into written fair trade agreements with competitors of such distributors. Second, Hudson argues that Section 1333.29(B) authorizes a proprietor to compel its distributors to agree not to sell to competitors of such distributor if the competitor fails to observe minimum resale prices. Neither question is properly before this Court.

The horizontal agreement question was raised for the first time in Hudson's reply brief in the Supreme Court of Ohio. As noted above, the question was not timely raised under Ohio procedure and was not considered by the Ohio courts. Therefore, it cannot be considered by this Court. *Stembridge* v. *Georgia*, 343 U. S. 541, 547 (1952); *C. I. O.* v. *McAdory*, 325 U. S. 472, 477 (1945).

That the missing ingredient of this Court's jurisdiction is no mere procedural technicality, but goes to the very core of sound constitutional adjudication, is vividly illustrated by Hudson's effort to raise here the horizontal agreement question.

The premise of Hudson's request that this Court declare the Ohio Act unconstitutional is that the Ohio Act conflicts with the McGuire Act by authorizing a proprietor to require his distributors to enter into horizontal price agreements and refusal-to-sell arrangements. This premise, however, requires interpretation of the Ohio Act. If the Ohio Act does not authorize a proprietor to require such horizontal arrangements, the constitutional question disappears. The Ohio courts have not said whether it does or does not. The Court of Common Pleas did not, for the question was

neither briefed nor argued nor even mentioned in the pleadings or the evidence. The Court of Appeals did not, for the question was never referred to at any time by anyone. And the Ohio Supreme Court did not, and indeed under Ohio procedure could not, since no such issue had been raised in or dealt with by the lower courts.

Not only have the Ohio courts not given the Ohio Act the interpretation basic to even the existence of the constitutional question posed by Hudson, but it is highly doubtful that they would. Far from authorizing or requiring horizontal agreements, Section 1333.34 of the Ohio Act prohibits them. Hudson bases its contention on Section 1333.29(B) of the Ohio Act which authorizes fair trade contracts under which buyers are required to obtain fair trade contracts from those to whom they resell (Br. 49-50). That Section does not, however, say that such agreements may be required among competitors, and is limited by Section 1333.34 which prohibits agreements between competitors.*

Even if this were not so, there would still be a question of interpretation for the Ohio courts. They would have to determine whether the provision permitting a proprietor to require horizontal agreements between

* The qualifying clause ("except as otherwise specifically provided in Section 1333.29") which appears in Section 1333.34 quite obviously relates not to Section 1333.29(B) but to Section 1333.29 (A), which is the only subdivision of Section 1333.29 containing any provision specifically excluding the applicability of Section 1333.34 (such exclusion appearing in the sentence permitting a proprietor under certain circumstances to establish resale prices for his wholesale distributors even though competing with them). Hudson's attempt to read the specific exclusion of Section 1333.34 as applying to all of Section 1333.29 would read Section 1333.34 out of the Act since there is no other provision of the Ohio Act to which Section 1333.34 could apply.

competitors was intended to apply to interstate commerce or only to intrastate commerce. Under familiar principles, if extension of such a provision to interstate commerce would raise a constitutional question, any ambiguity would presumably be resolved in favor of confining it to intrastate commerce.

A further question of interpretation for the Ohio courts (regardless of whether or not Section 1333.29(B) were interpreted as limited by Section 1333.34) would be whether Section 1333.29(B) does or does not authorize agreements requiring refusals to sell (or, to use Hudson's term, "boycotts") of any kind. Certainly the Ohio Act does not say so; there is no such language anywhere in the Ohio Act. To give the Ohio Act such an interpretation the Ohio courts would have to read a boycott authorization into the statute.*

Few rules are more firmly established than the rule that where the constitutional validity of a state statute depends upon its interpretation, and the statute has not been interpreted by the state courts, this Court will not supply its own interpretation.** It is possible that

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* In connection with its horizontal agreement argument, Hudson lays considerable stress on paragraph 6 of Lilly's fair trade contract, under which the retailer agrees not to knowingly resell to fair trade violators. However, the Ohio courts were not called upon to interpret or apply either paragraph 6 of the contract or Section 1333.29(B) of the Ohio Act in relation to paragraph 6. The question whether paragraph 6 was authorized by the Ohio Act was not before the Ohio courts because by stipulation only the constitutionality of the Ohio Act was to be determined. Except in a reply brief in the Ohio Supreme Court, paragraph 6 was never even mentioned.

** *United States* v. *Raines,* 362 U. S. 17 (1960); *Rescue Army* v. *Municipal Court,* 331 U. S. 549, 575, 584 (1947); *Ashwander* v. *Tennessee Valley Authority,* 297 U. S. 288, 346-348 (1936) (concurring opinion of Mr. Justice Brandeis. Even were the Court to do so here, its interpretation of the Ohio Act would not be binding on the courts of Ohio. *Alabama State Federation of Labor* v. *McAdory,* 325 U. S. 450, 470 (1945).

the Ohio courts would interpret the Ohio Act in a manner which would remove all alleged inconsistencies between that Act and the McGuire Act. As stated in *Alabama State Federation of Labor* v. *McAdory*, 325 U. S. 450, 470, 471 (1945):

> "Most courts conceive it to be their duty to construe a statute, whenever reasonably possible, so that it may be constitutional rather than unconstitutional. [Cases cited] * * * State courts, when given the opportunity by the presentation to them for decision of an actual case or controversy, may, and often do, construe state statutes so that in their application they are not open to constitutional objections which might otherwise be addressed to them. [Cases cited] In advance of an authoritative construction of a state statute, which the state court alone can make, this Court cannot know whether the state court, when called on to apply the statute to a defined case or controversy, may not construe the statute so as to avoid the constitutional question. For us to decide the constitutional question by anticipating such an authoritative construction of the state statute would be either to decide the question unnecessarily or rest our decision on the unstable foundation of our own construction of the state statute which the state court would not be bound to follow. [Cases cited] Such is not the function of the declaratory judgment."

As shown in III below (p. 36), the horizontal agreement question is entirely hypothetical since there is no suggestion in the Lilly record that Lilly has required retailers to enter into any agreements with anyone.

C. The Notice Question (Hudson's Question 1(c)).

Although the notice question has been raised in one form or another throughout this case, it has never been

passed upon by the Ohio courts. Indeed, it is difficult to determine precisely what the question is. As stated by Hudson to this Court (Br. 4), the question is whether the Ohio Act conflicts with the McGuire and Sherman Acts "by authorizing the 'proprietor' of a trademark or trade name, who need not necessarily be the owner thereof, to establish minimum resale prices by notice to distributors without the consensual agreement intended by Congress."

The record shows that Lilly established minimum resale prices by written contracts with over 1,400 retailers in Ohio. Following this, Lilly gave notice to Hudson, and all other known Ohio retailers who had not executed written agreements, of the fact that Lilly had so established minimum resale prices. As shown in III below (p. 42), the question presented by Hudson is again hypothetical.

Hudson apparently takes the position that even though the McGuire Act admittedly permits non-contracting parties to be bound by resale prices under state fair trade statutes, the McGuire Act sanctions only state statutes which in addition *require*, as well as *permit*, express contracts to observe the minimum prices. There is no dispute that Lilly actually entered into more than 1,400 such contracts, but the argument is that the Ohio Act does not require, but only permits, such express contracts and is therefore outside the McGuire Act.

This view of the McGuire Act, far-fetched as it is, requires an interpretation of the Ohio Act. Does the Ohio Act in fact require, or does it only permit, express contracts for minimum resale prices? The

Ohio courts have not answered or even considered this question of statutory interpretation. On one interpretation the supremacy clause question asserted by Hudson would vanish. The question is therefore premature.

Hudson is asking this Court to make an interpretation of the Ohio Act which, according to Hudson's interpretation of the McGuire Act, would render the Ohio Act unconstitutional. As this Court stated in *St. Louis S. W. Ry.* v. *Arkansas,* 235 U. S. 350, 369 (1914):

> "No canon of construction is better established or more universally observed than this, that if a statute will bear two constructions, one within and the other beyond the constitutional power of the law-making body, the courts should adopt that which is consistent with the Constitution, because it is to be presumed that the legislature intended to act within the scope of its authority."

D. The Due Process Question (Hudson's Question 2).

The Amended Petition in this proceeding contained allegations raising the federal due process question (R. 6). However, the question was never heard of again in the Court of Common Pleas, in the Court of Appeals for Cuyahoga County or the Ohio Supreme Court. Indeed there was no mention of it until Hudson's Notice of Appeal in this Court.

Since Hudson did not preserve the federal due process question throughout the appellate proceedings in Ohio, it abandoned this question under Ohio law. *Uncapher* v. *B. & O. Rd. Co.,* 127 Ohio St. 351, 356, 188 N. E. 553 (1933); *Riss & Co.* v. *Bowers,* 114 Ohio App.

429, 438, 183 N. E. 2d 795 (1961); *Drobne* v. *Aetna Casualty & Surety Co.,* 66 Ohio L. Abs. 1, 115 N. E. 2d 589 (Ct. of App. 1950). To enable this Court to review this question, Hudson would have had to raise it in the Ohio Supreme Court in accordance with the requirements of Ohio law. *Beck* v. *Washington,* 369 U. S. 541, 549-554 (1962). Hudson's abandonment of this question in the Ohio appellate courts is fatal to its attempt to raise it here. *Herndon* v. *Georgia,* 295 U. S. 441 (1935); *Beaty* v. *Richardson,* 276 U. S. 599 (1928).

In any event, the unanimous opinion of this Court in *Old Dearborn Distributing Co.* v. *Seagram-Distillers Corp.,* 299 U. S. 183 (1936), settled the meaning of the Constitution on the due process question nearly 30 years ago. The due process question is therefore not a federal question warranting review by this Court.

E. The Severability Question (Hudson's Question 3).

Even if it should be determined that any provision of the Ohio Act is invalid as applied to interstate commerce, the question arises whether the remaining provisions of the Act are severable. The severability of invalid provisions of a state statute is a question solely for determination by the state courts, not by this Court (see p. 67, *infra*).

F. The Lanham Act and Federal Food, Drug and Cosmetic Act Questions.

The Lanham Act question was not raised at any time in the Ohio Courts and the Federal Food, Drug and Cosmetic Act question was not raised until Hudson's Brief to the Ohio Supreme Court. Neither point

was mentioned in Hudson's Notice of Appeal or Jurisdictional Statement in this Court.

Rules 10(2)(c), 15(1)(c)(1) and 40(1)(d)(2) of this Court provide that only the questions set forth or fairly comprised within the Notice of Appeal and Jurisdictional Statement will be considered by this Court. Hudson is precluded from raising these questions now, both because they were not raised and decided below and because they were not set forth or fairly comprised in the questions set forth in either the Notice of Appeal or the Jurisdictional Statement.

III.

There is no conflict between the Ohio Act and the McGuire Act on the facts of this case.

Hudson specifically challenges only a few provisions of the Ohio Act, none of which are applicable to the facts of this case.

A. Since Lilly Does Not Compete With Its Wholesalers, the *McKesson* Case Question Is Not Involved in This Proceeding.

Hudson argues that the concluding sentence of Section 1333.29(A) of the Ohio Act, authorizing a proprietor to establish minimum resale prices for wholesale distributors with whom it competes, conflicts with the McGuire Act, citing this Court's decision in *United States* v. *McKesson & Robbins, Inc.*, 351 U. S. 305 (1956). The *McKesson* case held that the McGuire Act did not permit the largest drug wholesaler in the country to set fair trade prices, on products it manufactured, to be observed by wholesalers with whom it competed.

The record in this case is clear, and Hudson concedes, that Lilly sells its products to wholesalers only and does not sell to any retailers (R. 19-20; Br. 14-15). Since Lilly does not compete with wholesalers for whom it sets fair trade prices, and because the only fair trade prices applicable to Hudson are those set for retailers, the question raised by Hudson is wholly hypothetical.

Since at least as early as 1885, this Court has never deviated from its fixed practice of declining to decide abstract, hypothetical or contingent questions. In *Liverpool, N. Y. & P. S. S. Co.* v. *Commissioners of Emigration*, 113 U. S. 33, 39 (1885), this Court, in refusing to pass upon the constitutionality of a statute where it was not clear from the record that there were facts to which the statute would apply, said:

> "If, on the other hand, we should assume the plaintiff's case to be within the terms of the statute, we should have to deal with it purely as an hypothesis, and pass upon the constitutionality of an act of Congress as an abstract question. That is not the mode in which this court is accustomed or willing to consider such questions. It has no jurisdiction to pronounce any statute, either of a State or of the United States, void, because irreconcilable with the Constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies. In the exercise of that jurisdiction, it is bound by two rules, to which it has rigidly adhered, one, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied."

This principle was reiterated and applied in the Court's decision in *Alabama State Federation of Labor* v. *McAdory*, 325 U. S. 450, 461 (1945) where the Court reviewed many of the numerous cases in which it had adhered to this practice over the years since its 1885 pronouncement in the *Liverpool* case.*

Since there is nothing about Lilly's distribution system, and not a line in the record, to raise any conceivable question regarding the sentence in Section 1333.29(A) of the Ohio Act attacked by Hudson, Hudson's hypothetical argument poses nothing for this Court to consider.

B. Section 1333.29(B) of the Ohio Act as Applied to the Facts of This Case Does Not Conflict with the McGuire Act.

The difficulties involved in Hudson's insistence on raising questions premised on dubious interpretations of the Ohio Act not made by the Ohio courts are nowhere more dramatically illustrated than in its argument of the horizontal agreement question. Hudson claims that Section 1333.29(B) of the Ohio Act authorizes horizontal price agreements and horizontal boycotts and is therefore "in violation of Section 5(a)(5) of the McGuire Act" (Br. 50).

Hudson's argument in summary is this:

> (1) Subsection 29(B)(2) of the Ohio Act authorizes a proprietor, by notice, to require a distributor to obtain an agreement from any subsequent buyer from the distributor that such buyer

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* Other cases involving this principle include the following: *United States* v. *Raines*, 362 U. S. 17 (1960); *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288, 346-348 (1936) (concurring opinion of Mr. Justice Brandeis); *St. Louis S. W. Ry.* v. *Arkansas*, 235 U. S. 350 (1914); *Tyler* v. *Judges of Court of Registration*, 179 U. S. 405 (1900).

will observe the proprietor's minimum resale prices;

(2) Although that Subsection does not specifically so provide, it could be interpreted as authorizing a proprietor to require a distributor, by notice, not to sell to any buyer from such distributor if the buyer does not observe the proprietor's minimum resale prices (and therefore impliedly authorizes paragraph 6 of Lilly's fair trade contracts with Ohio retailers);

(3) The distributor and the subsequent buyer or prospective buyer from the distributor could be competitors;

(4) "Horizontal" agreements are prohibited by paragraph 5 of the McGuire Act;

(5) Therefore, Subsection 29(B) of the Ohio Act authorizes "horizontal" price fixing and refusal-to-sell agreements forbidden by the McGuire Act.

As shown above (pp. 26-28), this argument requires interpretation of the Ohio Act in at least two major respects which the Ohio courts were not called upon to, and did not, consider.

This entire question is hypothetical. Lilly's fair trade contracts with retailers did not contain any provision requiring the retailer to enter into agreements with anyone. Moreover, paragraph 6 of Lilly's fair trade contract is not involved in this case since Lilly does not seek to require Hudson to refuse to sell to any other person, nor does Hudson claim that any other retailer has refused to sell Lilly's products to Hudson.*

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* As shown by Lilly's letters to Hudson, Lilly's only demand was that Hudson observe Lilly's minimum fair trade prices. They contained no demand on Hudson to refuse to sell to anyone (R. 15-18).

Even if the validity of Subsection 29(B)(2) of the Ohio Act, as applied to the facts of this case, were properly before this Court, there is no conflict between that Subsection, reasonably interpreted, and paragraph 5 of the McGuire Act. Paragraph 2 of the McGuire Act authorizes not only contracts and agreements "prescribing minimum or stipulated prices" but also contracts and agreements "requiring a vendee to enter into contracts or agreements prescribing minimum or stipulated prices". The House Committee Report on the McGuire Act characterizes this as "a provision expressly covering a contract which requires a vendee to enter into *another* contract prescribing a minimum or stipulated price."* (Emphasis supplied).

The McGuire Act thus expressly permits a trademark owner to require a written contract for observance of his resale prices not only by purchasers from the owner but also by subsequent buyers from the first purchaser. Subsection 29(B)(2) of the Ohio Act contains an identical authorization.

All this is undenied by Hudson. Its whole argument is that paragraph 2 of the McGuire Act is limited by paragraph 5 of that Act, prohibiting contracts between competitors, but that Subsection 29(B)(2) of the Ohio Act is not similarly limited by Subsection 34 of the Ohio Act. As shown above (p. 27), Subsection 34 of the Ohio Act does plainly limit Subsection 29(B)(2). Hudson's argument cannot be sustained without attributing different meanings to substantially identical provisions of the two statutes.

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* H. R. Rep. No. 1437, 82nd Cong., 2d Sess., at p. 6 (1952).

Reference has been made above (pp. 26-27) to the fact that the Ohio Act does not specifically authorize agreements requiring refusal-to-sell agreements and to the open question of statutory interpretation in this respect.* However, assuming that paragraph 6 of the Lilly fair trade contract is authorized by the Ohio Act, the McGuire Act is no bar. Lilly has executed fair trade agreements with over 65% of the retailers in Ohio. By notice, it has bound all other known retailers in Ohio selling products bearing Lilly's trademarks to observe Lilly's resale fair trade prices (R. 20-21). Thus, all retailers in Ohio dealing in Lilly's products are bound by the Ohio Act to observe Lilly's resale prices.

Paragraph 6 is nothing more than a method of ensuring a non-discriminatory resale price maintenance program and enforcing observance of the fair trade prices by persons already obliged to observe them.**

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* If the validity of paragraph 6 of the Lilly contract should be put in issue before the Ohio courts and held to be not authorized by the Ohio Act, such a holding would not affect the remaining provisions of the Lilly fair trade contract since paragraph 9 of that contract provides that "[t]his Contract shall be interpreted under and shall be subject to the limitations imposed by the Fair Trade Act of the state in which Retailer does business, and in the event any provision of this Contract shall be held invalid under such Act or under any other statute, law, or public policy, or in the event this Contract shall be held inapplicable with respect to any given set of facts or circumstances, then, or in either of such events, the remaining provisions of this Contract and its applicability to all other sets of facts or circumstances shall be unaffected thereby." (R. 14).

** This method of enforcement was employed in *Kunsman* v. *Max Factor & Co.*, 299 U. S. 198 (1936), one of the companion cases decided with *Old Dearborn*. "[B]y the terms of . . . [plaintiff's] contracts the distributors are obligated to sell these products only to retailers who will resell the same at specified prices, and who, in turn, have entered into a written contract with the plaintiff. . . ." *Max Factor & Co.* v. *Kunsman*, 5 Cal. 2d 446, 55 P.2d 177, 179 (1936).

It has been uniformly held under state fair trade laws that a trademark owner must take all reasonable steps necessary to enforce his resale prices in a fair and non-discriminatory manner or be deemed to have abandoned its fair trade program. Such steps include refusing to sell to retailers who do not observe the fair trade prices.* *Hutzler Bros. Co.* v. *Remington Putnam Book Co.*, 186 Md. 210, 46 A.2d 101 (1946); *U. S. Time Corp.* v. *Grand Union Co.*, 64 N. J. Super. 39, 165 A.2d 310 (Ch. 1960); *Calvert Distillers Company* v. *Wish*, 162 F. Supp. 364 (N. D. Ill. 1957), *aff'd*, 259 F. 2d 323 (7th Cir. 1958); *Calvert Distilling Co.* v. *Gold's Drug Stores*, 123 N. J. Eq. 458, 198 Atl. 536 (Ch. 1938); *Calvert Distillers Corp.* v. *Nussbaum Liquor Store*, 166 Misc. 342, 2 N. Y. S. 2d 320 (Sup. Ct. N. Y. Co., 1938). As the court said in the *Grand Union* case (165 A.2d at p. 315):

> "He must refrain from causing any unjust discrimination among the retail dealers, and in addition must exercise reasonable diligence to see that his products are not sold to a retailer who cuts prices after the producer has notice of such violation and he may be required to resort to legal action if necessary."

No one disputes that the Ohio Act by its terms permits enforcement of fair trade prices against distributors acquiring a trademarked commodity with notice of the fair trade price, even though not expressly contracting to observe the price. If under Ohio law one

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* Indeed, Hudson, in the subsequent enforcement proceedings in this case, has pleaded as an affirmative defense that Lilly abandoned its fair trade program because it failed to cut off violators. *Hudson Distributors, Inc.* v. *Eli Lilly and Co.*, 1963 Trade Cases ¶ 70,871 (Ct. of Common Pleas).

of the rights given as a means of enforcement of the fair trade prices is a right to prevent price violators from obtaining the commodity, there is no McGuire Act problem. Paragraph 3 of the McGuire Act expressly declares that nothing contained in the antitrust laws shall render unlawful the "exercise or the enforcement of any right or right of action" created by any such statute.

Hudson's argument regarding paragraph 6 amounts to saying that Ohio is required by the United States Constitution and the McGuire Act to see to it that a retailer complying with the fair trade law is permitted to aid and abet its violation by others. If anything is clear about the McGuire Act, it is that Congress intended to permit state fair trade laws, in the language of the House Committee Report, to "apply in their totality".* They could not so apply unless the states are permitted to make them effective and to require their non-discriminatory enforcement and observance.

The *Parke, Davis* case cited by Hudson in support of its position (Br. 27) is not in point.** That case involved resale price maintenance in jurisdictions having no fair trade laws in effect. Since resale price agreements were unlawful under local law, the enabling provisions of the McGuire Act were inapplicable.***

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* H.R. Rep. No. 1437, 82d Cong., 2d Sess., at p. 2 (1952).

** *United States* v. *Parke, Davis & Co.*, 362 U. S. 29 (1960).

*** Nor does *United States* v. *McKesson & Robbins, Inc.*, 351 U. S. 305 (1956) have any application to paragraph 6. That case merely held that a wholesale may not set fair trade prices on products it manufactures for a competitor wholesaler. There is not the slightest suggestion in the record that Lilly has entered into agreements with, or purported to set resale prices to be observed by, any competitor.

Similarly, in *Connecticut Importing Co.* v. *Continental Distilling Corp.*, 129 F. 2d 651, 654 (2d Cir. 1942), the issue was "[t]he wrong the plaintiff suffered . . . when it was excluded as a distributor" by the defendant before the enactment of the Miller-Tydings Act, 50 Stat. 693 (1937), 15 U. S. C. § 1 (1958), for refusing to adhere to resale price maintenance in interstate commerce. In *United States* v. *Bausch & Lomb Co.*, 321 U. S. 707 (1944), the defendant had also commenced resale price maintenance in interstate commerce before enactment of the Miller-Tydings Act. The Court found that the defendant's fair trade practices, "otherwise valid" after the passage of the Miller-Tydings Act, had come into existence as "a patch upon an illegal system of distribution" (321 U. S. at p. 724) and covered products manufactured by others and therefore not eligible for resale price maintenance. In *United States* v. *Frankfort Distilleries, Inc.*, 324 U. S. 293 (1945), wholesalers and retailers had combined to compel manufacturers to adopt resale price maintenance, a combination clearly not authorized by the Miller-Tydings Act.

By this argument, Hudson is asking this Court (a) to decide a hypothetical question, (b) to make two very dubious interpretations of the Ohio Act not made by the Ohio courts, and (c) to construe the McGuire Act as prohibiting a reasonable method of enforcing state statutory rights, and on that basis to invalidate this state statute under the supremacy clause of the United States Constitution.*

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* U. S. Const. art. 6, cl. 2.

C. The Provisions of the Ohio Act Under Which Lilly Established Its Resale Price Maintenance Program Are Authorized by the McGuire Act.

When the Ohio Act was enacted, Lilly established its resale price maintenance program in Ohio by entering into written fair trade contracts with over 1,400 retailers. After Lilly had established minimum resale prices for its trademarked commodities by these written contracts, it so notified all other known retailers in Ohio, including Hudson. Hudson was informed that, under the law of the State of Ohio, it would be bound to observe such minimum resale prices with respect to any products bearing Lilly's trademark which it acquired after receiving notice of the restrictions. After receiving such notice, Hudson purchased Lilly products and sold them below the minimum prices established by the contracts described above.

The notice question posed by Hudson is thus wholly hypothetical. Whether the statute would authorize the establishment of minimum resale prices by notice alone, without the written contracts, is not presented by the facts of this case.*

Hudson argues that the provisions of the Ohio Act under which Lilly established minimum resale prices

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* Hudson's hypothetical question embodies a hypothetical sub-question as to whether fair trade prices may be established by persons other than the owner of the trademark or trade name. Lilly, of course, is the owner of all trademarks affixed to its goods (R. 20). Consequently, whether the Ohio Act authorizes persons who are not trademark owners to establish minimum resale prices is also a hypothetical question. *Schwegmann Bros. Giant Super Markets* v. *Eli Lilly & Co.*, 205 F.2d 788, 792 (5th Cir. 1953), *cert. denied*, 346 U. S. 856 (1953).

by written contracts, followed by notice of such prices to others, are not authorized by the McGuire Act. That they are so authorized is demonstrable by examination of paragraphs 2 and 3 of the McGuire Act.

Paragraph 2 of the McGuire Act.

Paragraph 2 of the McGuire Act provides in part as follows:

> "Nothing contained in this section or in any of the Antitrust Acts shall render unlawful any contracts or agreements prescribing minimum or stipulated prices, . . . when contracts or agreements of that description are lawful as applied to intrastate transactions under any statute, law, or public policy now or hereafter in effect in any State, . . ."

Section 1333.29(A) of the Ohio Act provides that "[i]t shall be lawful . . . for a proprietor to establish . . . by contract, stipulated minimum resale prices for a commodity of which he is the proprietor. . . ." Paragraph (B) of that section provides that a proprietor may give notice to a buyer "that the buyer will not resell such commodity at less than the minimum resale price stipulated by the proprietor thereof. . . ." Section 1333.28(I) provides, in part, that:

> "Any distributor (whether he acquires such commodity directly from the proprietor or otherwise) who, with notice that the proprietor has established a minimum resale price for a commodity, accepts such commodity shall thereby have entered into an agreement with such proprietor not to resell such commodity at less than the minimum price stipulated therefor by such proprietor."

Thus, under the law of Ohio, Hudson, by its voluntary act of purchasing Lilly's trademarked products for resale in Ohio after receipt of notice from Lilly that it had established resale prices on its trademarked goods by written contracts with others, entered into an implied contract with Lilly to observe such prices. As we understand Hudson's argument, it contends that the contract between Hudson and Lilly was not the kind of "contract or agreement" covered by paragraph 2 of the McGuire Act. This is incorrect.

In 1951, this Court considered whether the Miller-Tydings Act removed from the prohibition of the Sherman Act, 26 Stat. 209 (1890), 15 U. S. C. § 1 (1958), a state statute which authorized a trademark owner, by notice, to require a retailer who had not executed a written contract to observe resale price maintenance. *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U. S. 384 (1951). Calvert argued in that case that, since the Sherman Act outlawed "contracts", and the Miller-Tydings amendment to the Sherman Act excepted "contracts or agreements prescribing minimum prices for the resale" of a commodity when such contracts or agreements were lawful under state law, the Miller-Tydings Act immunized all arrangements involving resale price maintenance authorized by state law (341 U. S. at pp. 389-390).

After examining the history of the Miller-Tydings Act, the Court held that Congress had intended the words "contracts or agreements" as contained in that Act to cover only arrangements whereby the retailer had expressly agreed to be bound by the resale price

restrictions. The Court stated that (341 U. S. at p. 395):

> "It should be remembered that it was the state laws that the federal law was designed to accommodate. Federal regulation was to give way to state regulation. When state regulation provided for resale price maintenance by both those who contracted and those who did not, and the federal regulation was relaxed only as respects 'contracts or agreements,' the inference is strong that Congress left the noncontracting group to be governed by preexisting law."

Thus, although the relationship between the trademark owner and the non-signer was one of "contract" for the purposes of the Sherman Act, the words "contract or agreement" in the Miller-Tydings Act were given a narrower construction and applied only to express contracts.

Shortly after the *Schwegmann* decision, Congress passed the McGuire Act.* This Act was specifically designed to overrule the *Schwegmann* decision. The Report of the House Committee on Interstate and

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* The purpose of the McGuire Act was stated as follows in its preamble: "*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That it is the purpose of this Act to protect the rights of States under the United States Constitution to regulate their internal affairs and more particularly to enact statutes and laws, and to adopt policies, which authorize contracts and agreements prescribing minimum or stipulated prices for the resale of commodities and to extend the minimum or stipulated prices prescribed by such contracts and agreements to persons who are not parties thereto. It is the further purpose of this Act to permit such statutes, laws, and public policies to apply to commodities, contracts, agreements, and activities in or affecting interstate or foreign commerce" (66 Stat. 631-632 (1952)).

Foreign Commerce, which accompanied the McGuire Act, declared that:

"The primary purpose of the [McGuire] bill is to reaffirm the very same proposition which, in the committee's opinion, the Congress intended to enact into law when it passed the Miller-Tydings Act (act of August 17, 1937, title VIII, 50 Stat. 673, 15 U. S. C. sec. 1), to the effect that the application and enforcement of State fair-trade laws—including the nonsigner provisions of such laws—with regard to interstate transactions shall not constitute a violation of the Federal Trade Commission Act or the Sherman Antitrust Act. This reaffirmation is made necessary because of the decision of a divided Supreme Court in *Schwegmann v. Calvert Distillers Corporation* (341 U. S. 384, May 21, 1951). In that case, six members of the Court held that the Miller-Tydings Act did not exempt from these Federal laws enforcement of State fair-trade laws with respect to nonsigners. Three members of the Court held that the Miller-Tydings Act did so apply.

"The end result of the Supreme Court decision has been seriously to undermine the effectiveness of the Miller-Tydings Act and, in turn, of the fair-trade laws enacted by 45 States. *H.R. 5767, as amended, is designed to restore the effectiveness of these acts by making it abundantly clear that Congress means to let State fair-trade laws apply in their totality; that is, with respect to nonsigners as well as signers.*" (Emphasis supplied).*

By the McGuire Act, Congress specifically expressed its intent to permit trademark owners to require retailers to observe resale price restrictions where state

* H.R. Rep. No. 1437, 82d Cong., 2d Sess., at pp. 1-2 (1952).

fair trade laws so allow, irrespective of whether the retailer expressly contracted to abide by such restrictions. The McGuire Act took pains to exempt *"any* contract" which would come within the provisions of the Sherman Act from the prohibitions contained in that Act, making clear its intention that the McGuire Act should apply to whatever contract state law might recognize as lawful.

If citation of authority be necessary to show that the meaning of "any" is "any", this Court has provided it. *Kilpatrick* v. *Texas & Pacific Railway Co.*, 337 U. S. 75, 77 (1949); *McMurray* v. *Brown*, 91 U. S. 257 (1875). Congress was perhaps aware of this Court's holding nearly a hundred years ago in the *McMurray* case that the words "any contract" in a statute "are sufficiently comprehensive to include special contracts as well as contracts which arise by implication" (91 U. S. at p. 265). By its terms, its history and its stated purposes, paragraph 2 of the McGuire Act means precisely what it says: "any contracts" relating to resale price maintenance which are lawful "as applied to intrastate transactions under any statute, law, or public policy now or hereafter in effect in any State" are lawful under the McGuire Act.

The question of how contracts are to be entered into, and what contracts are lawful under state law as applied to intrastate transactions, is obviously a question for the state to determine. By the Ohio Act, the State of Ohio has determined that, when a retailer receives from a trademark owner an offer to permit the retailer to utilize the owner's property in-

terest in its trademark in exchange for the retailer's agreement to abide by the owner's resale price restrictions, the retailer's subsequent voluntary use of the owner's trademark is an acceptance of the offer and a contract. It cannot be denied that a trademark owner has a proprietary interest in his trademark. "[G]oodwill is property in a very real sense . . . [g]oodwill is a valuable contributing aid to business—sometimes the most valuable contributing asset of the producer or distributor of commodities. And distinctive trade-marks, labels and brands, are legitimate aids to the creation or enlargement of such goodwill." *Old Dearborn Distributing Co.* v. *Seagram-Distillers Corp.*, 299 U. S. 183, 194-195 (1936). As the *Old Dearborn* decision stated (299 U. S. at pp. 194-195):

> "Appellants own the commodity; they do not own the mark or the good will that the mark symbolizes. . . . The ownership of the good will . . . remains unchanged, notwithstanding the commodity has been parted with."

Section 1333.31 of the Ohio Act does nothing more than legislatively reflect this holding of that Court.*

Such a contract is within the common law meaning of contract. Williston states that a contract may arise from a "seller's making a general offer to all the world in this way, to be accepted by taking ownership in the

* Section 1333.31 provides that: "A proprietor shall retain a proprietary interest in any commodity with respect to which he is a proprietor after he has sold it to distributors, so long as such commodity continues to be identified by his trade-mark or trade name, by reason of his interest in stimulating demand for such commodity through effective distribution to ultimate consumers and of his interest in continuing protection of the good will associated with his trade-mark or trade name."

property, provided consideration could be found for the promise of the purchaser, and also such communication to the promisee as is necessary for a contract." 1 WILLISTON, CONTRACTS, § 90E (3d ed. 1957). As the Ohio Supreme Court succinctly analyzed this contract:

> "This provision of the law is essentially very simple. It is simple contract law. The owner of a trademark offers his goods bearing that mark which are in free and open competition in the open market for resale, on condition that the retail price be maintained at a certain level. This is basic contract law; an offer may be made on condition. Under the Ohio law, the owner of the trademark, once the goods enter into Ohio, has by statute sufficient interest to control the resale price of the goods. The acceptance of this offer is purely voluntary, but if it is accepted it must be accepted on the imposed conditions or not at all. If the offer is accepted, the retailer in consideration of the goodwill attached to the trademark and the demand created by the owner thereof contracts to sell it at the agreed price." *Hudson Distributors, Inc.* v. *The Upjohn Co.*, 174 Ohio St. 487, 190 N. E. 2d 460, 463 (1963).

That decision also pointed out that similar contracts are legislatively implied in many other situations (190 N. E. 2d at p. 463):

> "Legislative conditions and contracts are not new in the law, they appear in many instances, and once the parties enter into an agreement they are bound by the legislative contract no matter what the parties intended. This is exemplified in the law relating to insurance contracts wherein statutory provisions and conditions are imposed in every insurance contract no matter what the intent of the parties. This is true as to statutory

bonds, negotiable instruments, bulk sales and mechanics' liens."

Hudson, by purchasing Lilly's trademarked products for resale in Ohio after receiving an offer from Lilly to permit Hudson to use Lilly's property interest in that trademark, accepted Lilly's offer and, pursuant to the provisions of the Ohio Act, entered into a contract with Lilly in a manner recognized by Ohio law.* An offer, acceptance and consideration in the common law sense were present. Paragraph 2 of the McGuire Act, which exempts from the antitrust laws "any contracts or agreements prescribing minimum or stipulated prices . . . when contracts or agreements of that description" are authorized by state law, covers this contract between Hudson and Lilly.**

Paragraph 3 of the McGuire Act.

Even if the term "any contracts or agreements" in paragraph 2 of the McGuire Act did not include the contract recognized by the Ohio Act, arising from Hudson's voluntary purchase of goods bearing Lilly's trademark with a knowledge of the resale price re-

* *Bulova Watch Co. Inc.* v. *Zale-Norfolk, Inc.* (No. 2570, Court of Law and Chancery of the City of Norfolk, Virginia), cited by Hudson (Br. 71), held that the Virginia fair trade statute did not imply a contract where a retailer obtained the products involved from a source other than the trademark owner. This construction of the Virginia statute is obviously inapplicable to the Ohio Act since the latter Act, unlike the Virginia statute, specifically provides that a contract arises "whether [the distributor] acquires such commodity directly from the proprietor or otherwise. . . ." Section 1333.28(I).

** *Accord*, Note, 77 Harv. L. Rev. 763 (1963).

striction, paragraph 3 of the McGuire Act would sustain Lilly's enforcement of the resale prices against Hudson.* Lilly established minimum resale prices by written contracts, as authorized by Section 1333.29(A) of the Ohio Act. It then gave notice of the establishment of these prices to Hudson and informed Hudson that it could not resell any Lilly trademarked products at less than the minimum prices stipulated in the written contracts. Section 1333.32(A) of the Ohio Act provides that it is an act of unfair competition for Hudson, with notice that Lilly has established minimum resale prices, to purchase and resell Lilly's commodities at less than the minimum prices.

Although never clearly articulated, Hudson apparently argues that paragraph 3 of the McGuire Act covers only state statutes which require, and not merely permit, the establishment of retail prices by a written contract, while the Ohio Act can only be interpreted as permitting the establishment of resale prices by notice alone without the necessity of having

* Paragraph 3 reads as follows:

> "Nothing contained in this section or in any of the Antitrust Acts shall render unlawful the exercise or the enforcement of any right or right of action created by any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia, which in substance provides that willfully and knowingly advertising, offering for sale, or selling any commodity at less than the price or prices prescribed in such contracts or agreements whether the person so advertising, offering for sale, or selling is or is not a party to such a contract or agreement, is unfair competition and is actionable at the suit of any person damaged thereby."

any written contracts. As pointed out above, the Ohio courts have not made such an interpretation. Lilly had established resale prices by hundreds of written contracts. The Ohio courts had no occasion to, and did not, decide whether the Ohio Act would make the notice to Hudson binding absent any such contracts. Had the Ohio Courts been asked to interpret the Ohio Act on this point, they would have been aware that "[m]ost courts conceive it to be their duty to construe a statute, whenever reasonably possible, so that it may be constitutional rather than unconstitutional". *Alabama State Federation of Labor* v. *McAdory*, 325 U. S. 450, 470 (1945).

Even assuming that the McGuire Act sanctions only state statutes which require the existence of at least one written contract, the Ohio Act could have been so interpreted. Section 1333.29(A) of the Ohio Act, the principal operative provision of this Act, provides that it shall be lawful "for a proprietor to establish and control by notice to distributors or by contract, stipulated minimum resale prices for a commodity. . . ." This provision can be read as meaning that it shall be lawful "for a proprietor to establish stipulated minimum resale prices [by contract]" and to "control [stipulated minimum resale prices] by notice to distributors or by contract."*

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* Indeed, only a comma after the word "establish", in the portion of Section 1333.29(A) quoted above, would be needed to make this the only reasonable interpretation. The comma which presently appears in the quoted part of Section 1333.29(A) is grammatically erroneous unless another comma is read into that quoted part after the word "establish".

This interpretation seems indicated when compared with Sections 1333.32(A) and 1333.28(I) of the Ohio Act.*

Moreover, even if the Ohio Act were interpreted as permitting the establishment of resale prices by notice alone, in addition to permitting the establishment of prices by written contracts, it would comply with paragraph 3 of the McGuire Act. Paragraph 3 covers any state statute which "in substance provides" that it is unfair competition for a person to sell any commodity at less than the price prescribed in a written contract, whether the person so selling is or is not a party to such a contract. The Ohio Act, as so interpreted, would make it unfair competition for Hudson to sell Lilly commodities bearing Lilly's trademark at less than the price Lilly has prescribed in written contracts with others, whether Hudson is or is not a party to such a contract.

Hudson's argument that the McGuire Act covers only state statutes which require, as well as permit, the establishment of resale prices by a written contract does violence not only to the language of paragraph 3 but also to the intent of Congress in passing the McGuire Act. Congress made it as clear as the English language could that the McGuire Act "is designed to restore the effectiveness of . . . [fair-trade] acts by

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* Section 1333.32(A) provides that it shall be unfair competition "for any distributor with notice that a proprietor *has established* a stipulated minimum resale price. . . ." (Emphasis supplied).

Section 1333.28(I) applies to any distributor "who, with notice that the proprietor *has established* a minimum resale price. . . ." (Emphasis supplied).

making it abundantly clear that Congress means to let State fair-trade laws apply in their totality" and to permit the states "to experiment further with fair-trade legislation."*

In attempting to support the various sub-arguments which it appears to be raising, Hudson includes references to various sources entirely irrelevant to the question presented. These include random statements of various members of Congress having no discernible relation to any of Hudson's points, and citations to federal cases not involving state fair trade statutes, to support the truism that the antitrust laws prohibit price-fixing. Perhaps the most extreme examples of this irrelevant material are the voluminous quotations from bills proposed to the Congress, and scattered comments of all and sundry upon them, subsequent to the enactment of the McGuire Act. These materials apparently are relied upon as "legislative history" of the McGuire Act. All of this "history" occurred after the passage of the McGuire Act and is irrelevant. *United States* v. *Philadelphia Nat. Bank,* 374 U. S. 321, 348-9 (1963). It is beside the point for the further reason that it relates to bills which were neither passed nor voted upon by the Congress.**

Hudson even goes to the extreme of arguing that the introduction by Congressman Harris of a proposed amendment to the McGuire Act in 1959 (H. R. 1253), a bill never passed or voted on, evidenced a belief on

* H.R. Rep. No. 1437, 82d Cong., 2d Sess., at pp. 2, 5 (1952).

** In *Schwegmann Bros.* v. *Calvert Distillers Corp.,* 341 U. S. 384, 392-3 (1951), this Court stated that such materials relating to bills proposed to the Congress prior to the Miller-Tydings Act, which were not passed or voted upon, did not form a legitimate part of the legislative history of that Act.

the part of the entire Congress that the McGuire Act does not authorize a trademark owner to establish resale prices by notice.* None of the materials cited are relevant to a consideration of the meaning of the McGuire Act and none cast any doubt on the validity of the Ohio Act as authorized by the McGuire Act.

When all is said and done, Hudson's argument is reduced to an attempt to create a conflict between the McGuire Act and a state fair trade law by a tortuous, literalistic parsing of the words of the two statutes. When viewed substantively, and on a reading of the statutes to mean what they say, the argument cannot stand analysis in the light of the clear Congressional purpose.

D. The Ohio Act Introduces No New Concept of Trademark Law and Is Unaffected by the Lanham Act.

Hudson's brief (p. 75) professes to regard as a new concept the recognition by the Ohio Act of the continuing proprietary interest of the owner of a brand, name or trademark and states that the most ardent advocates of fair trade have been unable to find any basis in law for it. One need look no further than the case of *Old Dearborn Distributing Co.* v. *Seagram-Distillers Corp.*, 299 U. S. 183 (1936) to find that there is nothing novel about the concept and that it was recognized by the Justices of this Court, without a single

* This proposed amendment of the McGuire Act was not included in subsequent bills introduced by Congressman Harris in later Congresses (H.R. 7685, introduced June 15, 1961; H. J. Res. 636, introduced February 21, 1962; and H.R. 3669 introduced February 11, 1963). Under Hudson's theory, the omission of the proposed amendment from these bills indicates that, on further reflection, the entire Congress concluded that the contracts arising from conduct of the parties described in the Ohio Act are fully authorized by the McGuire Act.

dissent, as an interest to which the states might constitutionally accord protection through fair trade laws. Even though the Illinois fair trade statute involved in that case did not specifically declare the proprietary interest concept, this Court twice pointed out that the primary aim of the statute was "to protect the property—namely, the goodwill—of the producer, which he still owns" and that "[a]ppellants own the commodity; they do not own the mark or the good will that the mark symbolizes" (299 U. S. at pp. 193, 194).

Even if there were something new about the concept, it would make no difference in view of (a) the clear provision of paragraph 2 of the McGuire Act which makes lawful any contracts or agreements lawful "under any statute, law, or public policy now *or hereafter in effect* in any State, Territory, or the District of Columbia" (emphasis supplied), (b) the clause "in substance provides" in paragraph 3 of the McGuire Act, and (c) the unequivocal declaration that the states were authorized "to experiment further with fair-trade legislation". H. R. Rep. No. 1437, 82nd Cong., 2d Sess. at p. 5 (1952).

Hudson also argues, for the first time in its brief in this Court, that the Lanham Act, 15 U. S. C. § 1127 (1958), precludes the Ohio Act because of the preemption by the Congress of "the subject of trade-marks in commerce" (Br. 75). The argument is almost incomprehensible. It speaks as though the Lanham Act had something to do with resale price maintenance, which it does not; as though Congress in the McGuire Act had not expressly consented to the enactment by the states of fair trade legislation applying to interstate com-

merce, which it so clearly did; and as though the Lanham Act had come after the McGuire Act instead of the other way around.

Article I, Section 8, Clause 8 of the United States Constitution confers on the United States Congress sole power to legislate in the field of patents and copyrights. No such power over trademarks is conferred. Hudson indicates awareness of this when it makes the incredible statement (Br. 77) that the Ohio Act "would repeal the established law of copyrights and patents".

The right of the Federal Government to legislate in the field of trademarks is based on the commerce clause, the same constitutional provision which empowered the Congress to enact the Sherman Act and the McGuire Act.* Congress, by the McGuire Act, has specifically delegated to the states the power to authorize the establishment of minimum prices for the resale in interstate commerce of commodities identified by trademarks. Even if there were any inconsistency between the Lanham Act and the McGuire Act, the specific provisions of the McGuire Act would prevail since that statute was enacted subsequent to the Lanham Act.**

There is in fact no inconsistency between the Ohio Act and the Lanham Act. The purpose of the Lanham Act is to protect against misleading use ("passing off") in interstate commerce of trademarks registered under the Act. *Federal-Mogul-Bower Bearings, Inc.* v. *Azoff*, 313 F.2d 405, 409 (6th Cir. 1963). To this extent

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* U. S. Const. art. 1, § 8, cl. 3

** The Lanham Act was enacted in 1946 (60 Stat. 427) and the McGuire Act in 1952 (66 Stat. 632).

only, Congress had "preempted" the field. *Philco Corporation* v. *Phillips Mfg. Co.*, 133 F. 2d 663 (7th Cir. 1943).

The Ohio Act, on the other hand, is limited to defining the substantive law of resale price maintenance, and trademarks are considered solely for the purpose of identifying those commodities lawfully subject to resale price restrictions within the State of Ohio.

Even if the Lanham Act had displaced state power over resale price maintenance in interstate commerce, the same commerce clause which enabled it to do so would equally enable it to restore state power by enacting the McGuire Act. *Prudential Ins. Co.* v. *Benjamin*, 328 U. S. 408 (1946).

None of the cases cited by Hudson on this branch of the case has anything to do with the arguments Hudson advances here.*

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* *Time Inc.* v. *T.I.M.E., Inc.*, 123 F. Supp. 446 (S. D. Calif. 1954) was an ordinary trademark infringement suit. The case is significant here, if at all, only for its express recognition of the fact that, although federal remedies for infringement are afforded by the Lanham Act, "ownership of the mark itself arises under and is governed by state law . . ." (123 F. Supp. at p. 453). Both *Sunbeam Corp.* v. *Wentling*, 192 F.2d 7 (3d Cir. 1951) and *Sunbeam Corp.* v. *Payless Drug Stores*, 113 F. Supp. 31 (N. D. Calif. 1953) involved an attempt to establish minimum resale prices as a common law right in the absence of any applicable fair trade statute. *Ethyl Gasoline Corp.* v. *U. S.*, 309 U. S. 436 (1940) was a Sherman Act conspiracy case not involving or mentioning fair trade contracts or fair trade laws. *United States* v. *Univis Lens Co., Inc.*, 316 U. S. 241 (1942) and *United States* v. *Bausch & Lomb Co.*, 321 U. S. 707 (1944) were Sherman Act conspiracy cases in which the basic issue was the validity of restrictive patent licensing systems. In each case the Miller-Tydings Act was held to be inapplicable to purported fair trade contracts because the patentee attempted to set resale prices on commodities manufactured by others—its licensees. The fair trade contracts entered into by Lilly under the Ohio Act are limited to commodities produced by Lilly, the trademark owner.

E. The Ohio Act Does Not Conflict with the Federal Food, Drug and Cosmetic Act.

Section 1333.33(D) of the Ohio Act permits the sale of a trademarked commodity at less than the minimum resale price provided the seller has removed the trademark from the article. Hudson argues that the removal of trademarks on drugs "is contrary to the national policy expressed by the provisions of the Federal Food, Drug, and Cosmetic Act" (Br. 79). In addition, Hudson argues that anyone who sells a trademarked product after the trademark has been removed has "passed off" the goods as his own and, consequently, is "in serious trouble as a tort feasor" (Br. 78).

It is difficult to follow Hudson's reasoning on this point. It is apparent on the face of the Food, Drug and Cosmetic Act provision cited by Hudson (21 U. S. C. § 331(b)) that removal of labeling is prohibited only if it results in adulteration or misbranding. The same Act provides (21 U. S. C. § 352(b)) that a drug is misbranded:

> "If in package form unless it bears a label containing (1) the name and place of business of the manufacturer, packer *or distributor*. . . ." (Emphasis supplied).

Since Hudson is a distributor of drug products, Hudson is not prohibited by the Federal Food, Drug and Cosmetic Act from removing the labeling of the manufacturer so long as it places on the drug its own label complying with Food and Drug Administration requirements. The statutory requirement is fully met if any one of the three—manufacturer, packer or dis-

tributor—is identified on the label. The Regulations under the federal Act recognize this.*

Obviously Lilly could not treat Hudson as a tortfeasor if Hudson exercised its right to substitute its label for Lilly's. By establishing resale prices under the Ohio Act, Lilly has accepted its provisions, including the provision permitting a retailer to avoid the necessity of observing the fair trade prices by avoiding any use of Lilly's trademarks or name.

All the Ohio Act says about removal of trademarks is that a distributor has a defense to a suit under the Act if he has removed the proprietor's trademark and made no use of the trademark in selling the commodity. Even if there were some independent legal impediment to removal of the trademark—which there is not—it would not follow that Hudson was entitled to use Lilly's trademarks for its own purposes in a manner prohibited by the Ohio Act.

Hudson's whole argument on this point makes two points plain: (1) that the Ohio Act does not interfere in any way with Hudson's ownership or resale of any commodity as such, but only conditions its right to use Lilly's trademarks or name, and (2) Hudson's real concern is not with the commodity it owns but with the right to misuse the Lilly name.

In permitting disregard of the minimum resale prices where no use is made of the proprietor's trade-

* "If a drug or device is not manufactured by the person whose name appears on the label, the name shall be qualified by a phrase which reveals the connection such person has with such drug or device, such as 'Manufactured for and Packed by ....,' 'Distributed by ....' or other similar phrase which expresses the facts." 21 C.F.R. § 1.102(a) (1963).

mark, the Ohio Act in no way conflicts with the Federal Food, Drug and Cosmetic Act.

IV.

The constitutionality of the Ohio Act under the due process clause of the Fourteenth Amendment is settled by decisions of this Court.

Hudson contends that the Ohio Act violates the due process clause of the Fourteenth Amendment "by reason of an uncontrolled and arbitrary delegation of power over the property and business lives of others without any procedural safeguards" (Br. 80). Hudson concedes, however, that this argument flies in the face of the unanimous decision of this Court in *Old Dearborn Distributing Co.* v. *Seagram-Distillers Corp.*, 299 U. S. 183 (1936), where this Court specifically considered and rejected an identical attack upon the non-signer provisions of the Illinois Fair Trade Law.*

Since the *Old Dearborn* decision, this Court has reviewed fair trade legislation in two decided cases. *Schwegmann Brothers* v. *Calvert Distillers Corp.*, 341 U. S. 384 (1951); *United States* v. *McKesson & Robbins, Inc.*, 351 U. S. 305 (1956). One can search these decisions in vain for even the slightest implication that state fair trade legislation binding non-signers may be unconstitutional under the United States Constitution.

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* These same challenges to the Illinois Fair Trade statute were also rejected in *McNeil* v. *Joseph Triner Corp.*, 299 U. S. 183 (1936), decided together with the *Old Dearborn* case. This result was also reached in the companion cases of *Kunsman* v. *Max Factor & Co.*, 299 U. S. 198 (1936) and *The Pep Boys, Manny, Moe & Jack of California, Inc.* v. *Pyroil Sales Co., Inc.*, 299 U. S. 198 (1936), both of which upheld the constitutionality of the California Fair Trade statute.

In the *Schwegmann* case, which was concerned solely with whether the Miller-Tydings Act was intended by Congress to cover non-signers, the Court recognized at least three times that Congressional approval of enforcement against non-signers would be constitutional.*

In the *McKesson* case, the Court stated that "[t]he issue presented is a narrow one of statutory interpretation", the sole question being the validity of a manufacturer-wholesaler's fair trade agreements with independent wholesalers with whom it was in competition.**

The United States Court of Appeals for the Fifth Circuit in *Schwegmann Bros. Giant Super Markets* v. *Eli Lilly & Co.*, 205 F. 2d 788 (5th Cir. 1953) specifically considered an attack on the constitutionality of the Louisiana fair trade statute, containing a non-signer provision, and found that statute constitutional under the Fourteenth Amendment. This Court denied certiorari.***

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* (1) "The fact that a state authorizes the price fixing does not, of course, give immunity to the scheme, *absent approval by Congress.*" (341 U. S. at p. 386) (Emphasis supplied).

(2) "*Had Congress desired* to eliminate the consensual element from the arrangement and to permit blanketing a state with resale price fixing if only one retailer wanted it, we feel that different measures would have been adopted—either a non-signer provision would have been included or resale price fixing would have been authorized without more." (341 U. S. at p. 390) (Emphasis supplied).

(3) "It should be remembered that it was the state laws that the federal law was designed to accommodate. Federal regulation was to give way to state regulation. When state regulation provided for resale price maintenance by both those who contracted and those who did not, and the federal regulation was relaxed only as respects 'contracts or agreements,' the inference is strong that *Congress left the noncontracting group to be governed by preexisting law.*" (341 U. S. at p. 395) (Emphasis supplied).

** 351 U. S. at p. 309 (1956).

*** 346 U. S. 856 (1953).

The Ohio Act falls squarely under the *Old Dearborn* decision. The Ohio Act sets forth in detail the legislative purposes for its enactment.* The notice provisions of the Ohio Act expressly provide that a nonsigner is bound only when he purchases a trademarked article for resale in Ohio with notice that minimum resale price restrictions have been imposed (Section 1333.28(I)). In the *Old Dearborn* case, the Court, in rejecting an argument that the Illinois Fair Trade Law violated the federal due process clause, said (299 U. S. at p. 193):

> "It is first to be observed that § 2 [the nonsigner provision] reaches not the *mere* advertising, offering for sale or selling at less than the stipulated price, but the doing of any of these things *wilfully* and *knowingly*. We are not called upon to determine the case of one who has made his purchase in ignorance of the contractual restriction upon the selling price, but of a purchaser who has had definite information respecting such contractual restriction and who, with such knowledge, nevertheless proceeds wilfully to resell in disregard of it. [Emphasis the Court's.]
>
> "In the second place, § 2 does not deal with the restriction upon the sale of the commodity *qua* commodity, but with that restriction because the commodity is identified by the trade-mark, brand or name of the producer or owner. The essence of the statutory violation then consists not in the bare disposition of the commodity, but in a forbidden use of the trade-mark, brand or name in accomplishing such disposition. The primary aim of the law is to protect the property—namely, the good will—of the producer, which he still owns. The price restriction is adopted as an appropriate

* Section 1333.27.

means to that perfectly legitimate end, and not as an end in itself."

Hudson says that "[t]he Ohio statute goes much further" than the Illinois statute involved in the *Old Dearborn* case (Br. 82). Its argument boils down to a pointless quibble: that non-signing distributors can be bound by a notice which is *only* a notice, but not by a notice which under the circumstances and the applicable state law also gives rise to a contract.

Hudson places heavy reliance (Br. 82, 84) on *Carter* v. *Carter Coal Co.*, 298 U. S. 238 (1936) and *Washington ex rel. Seattle Title Trust Co.* v. *Roberge*, 278 U. S. 116 (1928). Both of these cases were specifically considered and held inapplicable by this Court in the *Old Dearborn* decision (299 U. S. at p. 194):

> "We find nothing in this situation to justify the contention that there is an unlawful delegation of power to private persons to control the disposition of the property of others, such as was condemned in *Eubank* v. *Richmond*, 226 U. S. 137, 143; *Seattle Trust Co.* v. *Roberge*, 278 U. S. 116, 121-122; and *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 311. In those cases the property affected had been acquired without any preexisting restriction in respect of its use or disposition. The imposition of the restriction *in invitum* was authorized after complete and unrestricted ownership had vested in the persons affected. Here, the restriction, already imposed with the knowledge of appellants, ran with the acquisition and conditioned it."*

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* The remaining two cases cited by Hudson (Br. 83-84), *Browning* v. *Hooper*, 269 U. S. 396 (1926) and *Silver* v. *New York Stock Exchange*, 373 U. S. 341 (1963) involved facts and issues completely dissimilar to those presented in this case. In addition, the *Browning* case antedated this Court's decision in *Old Dearborn*.

Hudson is suggesting that this Court reweigh the wisdom of fair trade legislation and substitute its judgment for that of the Ohio Legislature. No principle of federal constitutional law is more firmly established than that decisions as to the economic and social wisdom of a statute are legislative, not judicial decisions. *Olsen* v. *Nebraska,* 313 U. S. 236 (1941); *Lincoln Union* v. *Northwestern Co.,* 335 U. S. 525, 536-7 (1949); *Day-Brite Lighting, Inc.* v. *Missouri,* 342 U. S. 421 (1952). As recently as last year, Mr. Justice Black, speaking for a unanimous Court in *Ferguson* v. *Skrupa,* 372 U. S. 726, 731-732 (1963), stated:

> "We refuse to sit as a 'superlegislature to weigh the wisdom of legislation,' and we emphatically refuse to go back to the time when courts used the Due Process Clause 'to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought.' Nor are we able or willing to draw lines by calling a law 'prohibitory' or 'regulatory.' Whether the legislature takes for its textbook Adam Smith, Herbert Spencer, Lord Keynes, or some other is no concern of ours."

The economic arguments and data for and against fair trade legislation have been the subject of dispute for decades. It has been shown by fair trade proponents, although of course disputed by others, that the overall result of fair trade laws is to lower, not increase, prices; that the price-cutting practices condemned by the fair trade laws threaten serious injury to producers of trade-marked and branded goods and businesses generally, large and small, and to lead to

destructive price wars; that fair trade laws help to prevent the growth of monopoly in distribution; that such laws are an effective means of preventing unfair methods of competition deceptive to the public; that the highly visible bargains offered by price-cutters on nationally known brands are often a screen for that not-so-visible price inflation on lesser known items; that loss-leader practices take various forms, such as sales either below cost or at substantially reduced mark-ups to lure the customer into the store; that the fair trade laws contribute significantly to the country's general social welfare and are conducive to the continued existence of a large number of small independent business concerns rather than concentration of retailing in the hands of a relatively small number of large retailers; and that in various other ways such laws promote the public welfare.

After days and days of hearing all the pros and cons, the Ohio legislature adopted the Ohio Act as sound economic policy for the State of Ohio.*

Hudson is simply endeavoring here to wage anew the battle which was lost in the Ohio Legislature by the opponents of fair trade legislation. The *Old*

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* Hudson's arguments as to the merits of cut-rate pricing in general, and its own pricing policies in particular, are of course irrelevant in considering the constitutionality of the fair trade laws. As shown by the cases already cited, these arguments raise questions appropriate only for legislative consideration. It is also clear that where a legislative body finds the existence of a general evil requiring remedial action, it has power to legislate generally, and it is immaterial whether or not all or any of the abuses aimed at by the statute have been engaged in by the defendant in a particular case arising under it. *North American Co.* v. *Securities & Exchange Commission*, 327 U. S. 686, 710-11 (1946); *Purity Extract Co.* v. *Lynch*, 226 U. S. 192, 201 (1912).

Dearborn decision established nearly 30 years ago that the United States Constitution contains nothing to prevent a state from enacting a fair trade law permitting resale price maintenance. At no time since has there been any amendment of the Constitution to change its meaning on this point.

V.

Whether provisions of a state act held invalid by this Court are severable from the remaining provisions of the Act is a question solely for the State Courts.

The last question which Hudson attempts to raise is whether the provisions of the Ohio Act which Hudson claims are unconstitutional "are so commingled and entwined with the remainder of the Act and so inseparable therefrom as to make the entire Act unconstitutional under the Federal Constitution" (Br. 5). Hudson's brief contains no argument on this question.

The question whether provisions of a state act held invalid by this Court are severable from the remaining provisions of the Act has long been recognized to be a matter for the state courts to decide. *Skinner* v. *Oklahoma,* 316 U. S. 535 (1942); *Dorchy* v. *State of Kansas,* 264 U. S. 286 (1924). The severability argument therefore presents no federal question.

If this Court should decide that any provision of the Ohio Act is unconstitutional under the United States Constitution, the case should be remanded to the Ohio courts for a determination of the severability question.

CONCLUSION

The judgment appealed from is not final, and none of the federal questions raised by Hudson were passed upon by the Ohio Supreme Court. Therefore, this Court lacks jurisdiction and should dismiss the appeal.

In the event that this Court determines that it has jurisdiction, the judgment of the Ohio Supreme Court should be affirmed.

Respectfully submitted,

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Louis S. Peirce
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April 8, 1964

APPENDIX A

IN THE COURT OF COMMON PLEAS

STATE OF OHIO
COUNTY OF CUYAHOGA } ss.

HUDSON DISTRIBUTORS, INC.,
Plaintiff,

vs.

ELI LILLY & COMPANY,
a corporation,
Defendant.

Case No. 730,118

SECOND AMENDED ANSWER TO CROSS-PETITION WITH INTERROGATORIES ANNEXED

FIRST DEFENSE

Plaintiff admits the allegations contained in paragraphs 3, 4, 5, 6, 7 and 8 of the cross-petition.

Plaintiff admits that it has sold, offered for sale and advertised for sale at prices less than defendant's fixed minimum retail prices commodities of defendant after notice of the establishment of such prices as alleged in paragraph 9 of the cross-petition, but denies that in so dealing in commodities manufactured by defendant plaintiff has acted willfully. Plaintiff states that it has carried on the said activities under the good faith belief that the Ohio Fair Trade Act is unconstitutional which belief plaintiff continues to maintain.

Plaintiff admits the allegations contained in paragraph 10 of the cross-petition.

Plaintiff denies the allegations contained in paragraphs 11, 12, 13 and 14 of the cross-petition.

Further answering, plaintiff denies each and every allegation of the cross-petition not herein expressly admitted to be true.

Second Defense

For its second defense plaintiff says that at the time of the transactions set forth in the cross-petition, and at the time defendant filed the said cross-petition, defendant, a foreign corporation, was transacting business in the State of Ohio without a license; that on or about February 9, 1962, defendant filed with the Secretary of State of Ohio a purported application for a license to transact business in Ohio; that said purported application contained material misrepresentations of fact and failed to comply with the requirements of *Ohio Revised Code* Section 1703.29; that defendant has not yet properly qualified to do business in the State of Ohio; that in direct contravention of *Ohio Revised Code* Section 1703.29 defendant is attempting to enforce its purported fair trade contract in the courts of the State of Ohio without having first properly obtained a license to do business in this state as a foreign corporation.

Third Defense

For its third defense plaintiff says that defendant, by the terms of its fair trade contracts with retailers, and in particular by the terms of paragraph 6 of said contracts, a specimen of which is annexed to the cross-petition as "Exhibit B", defendant compels such

retailers to enter into unlawful horizontal price fixing agreements with other competing retailers. Such contracts are in violation of Section 1 of the Sherman Antitrust Act, 26 Stat. 209, as amended, 15 U. S. C. Sections 1 through 8, and Section 5(a)(5) of the McGuire Act, 66 Stat. 632, 15 U. S. C. Section 45 (a)(5); that by reason of the express terms and provisions of the McGuire Act aforesaid defendant's fair trade contract is unlawful and unenforceable and hence may not be enforced against this plaintiff.

The case was submitted to the Honorable Eugene R. McNeill, Judge of the Court of Common Pleas of Cuyahoga County by Assignment, upon the pleadings, an Agreed Statement of Facts, evidence introduced by stipulation, and upon briefs of counsel. By agreement between the parties the case was submitted solely on the question of the constitutionality of the Act; there was not submitted the question of the relief to which Lilly would be entitled under the Act if it were upheld.

Fourth Defense

Defendant is at the present time permitting and has been permitting retailers throughout the State of Ohio to advertise, offer for sale and sell commodities bearing defendant's trademarks or trade names at prices below minimum retail prices fixed by defendant pursuant to the Ohio Fair Trade Act. By reason thereof defendant is precluded from enforcing said minimum retail prices as against plaintiff.

Fifth Defense

Defendant has countenanced and does now countenance in the State of Ohio prescription sales of its

products below fair trade prices fixed by defendant. Such conduct by defendant constitutes a modification of defendant's fair trade contracts and defeats defendant's right to enforce fair trade prices on both prescription and non-prescription sales.

Plaintiff annexes hereto certain Interrogatories which it demands be answered plainly and fully under oath by an officer of the defendant, each separately and independently, and not in a series.

Wherefore, plaintiff prays that the relief prayed for in its second amended petition be granted and that defendant's cross-petition be dismissed at defendant's costs and for such other, further and supplemental relief as will be equitable in the premises.

Lane, Krotinger & Santora
300 Chester-Twelfth Building
Cleveland 14, Ohio 861-1819

By Myron N. Krotinger
Myron N. Krotinger
Attorneys for Plaintiff

STATE OF OHIO
CUYAHOGA COUNTY } ss:

MYRON N. KROTINGER, being first duly sworn, deposes and says that he is one of the attorneys for the plaintiff, a corporation; that he is duly authorized in the premises; that he has read the foregoing Second Amended Answer to Cross-Petition with Interrogatories Annexed and that the allegations, averments and denials therein contained are true as he verily believes.

MYRON N. KROTINGER
Myron N. Krotinger

SWORN to before me and SUBSCRIBED in my presence this 8th day of July, 1963.

MORTON L. STONE
Notary Public
Morton L. Stone. My commission
expires September 3, 1963

SERVICE

Service of the foregoing Second Amended Answer to Cross-Petition with Interrogatories Annexed has been made by delivering a copy thereof to Henderson, Quail, Schneider & Peirce, National City Bank Building, Cleveland, Ohio, attorneys for defendant, this 8th day of July, 1963.

LANE, KROTINGER & SANTORA
Attorneys for Plaintiff

By MYRON N. KROTINGER
Myron N. Krotinger

APPENDIX B

TABULATION OF QUESTIONS URGED BY HUDSON

(References in parentheses are to pages of this Brief.)

	Question:	When First Raised Below:	Where Referred to or Decided by Court Below:
1(a)	*McKesson* Case*	Ohio Court of Appeals (7, 10, 25)	Never
1(b)	Horizontal Agreement**	Ohio Supreme Court (8, 10, 25)	Never
1(c)	Notice**	Court of Common Pleas (6, 10, 29)	Never
2	Due Process	Court of Common Pleas (Abandoned on Appeal), (6, 10, 31)	Never
3	Severability***	Court of Common Pleas	Never
4	Lanham Act	Never (9, 10, 32)	Never
5	Food, Drug, and Cosmetic Act	Ohio Supreme Court (9, 10, 32)	Never

* Question not raised by the facts of this case (R. 33-5).

** Question not raised by facts of this case (36; 42) and premised on unadjudicated interpretation of the Ohio Act (26-8; 30-1, 52-3).

*** Question premised on unadjudicated interpretation of the Ohio Act (18, 67).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 489

HUDSON DISTRIBUTORS, INC.,
Appellant,

v.

THE UPJOHN COMPANY,
Appellee.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF OHIO

BRIEF FOR THE APPELLEE

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Of Counsel

April 8 1964

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IN THE

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ON APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO

BRIEF FOR THE APPELLEE

Preliminary Statement

Plaintiff below, defeated in the Ohio Supreme Court in a suit for judgment declaring the unconstitutionality of the Ohio Fair Trade Act of 1959, appeals to this Court upon asserted Federal grounds which in our submission do not exist in the present posture of the case.

The Jurisdictional Statement claims jurisdiction under 28 U.S.C. §1257 and presents five Federal questions with respect to the alleged unconstitutionality of the Ohio Act. However, the judgment below in this case (and in the *Lilly* case, No. 490) does not have the requisite finality to sustain jurisdiction in this Court.

In addition, none of the five Federal questions presented (Jurisdictional Statement pp. 4-5) was passed on by the

Ohio Supreme Court. Appellant admits to this Court that the opinion below was concerned only with Ohio law (Brief p. 23). The questions now raised either were not presented at all in the courts below, do not arise out of the facts in this case, or were abandoned or reserved by stipulation of counsel.

Appellant's scattering and discursive brief, written without regard to the narrowness of the issue arising from the decision below, obliges us to burden the Court with an unusually detailed statement of the proceedings in Ohio.

Opinions Below

The opinion of the Ohio Supreme Court (R. 413-24) is reported at 174 Ohio St. 487, 190 N.E. 2d 460 (1963). The judgment entered thereon is printed in the record (R. 425).

The opinion of the trial court (R. 371-79), the Court of Common Pleas for Cuyahoga County, is not officially reported but is printed in 1960 CCH Trade Cases ¶ 69,778. The judgment entered thereon is printed in the record (R. 369-70). The opinion of the Court of Appeals for Cuyahoga County (R. 380-408) is reported in 18 Ohio Op. 2d 182, 176 N.E. 2d 236 (1961). The judgment entered thereon is printed in the record (R. 411-12).

Jurisdiction

Hudson asserts that jurisdiction of this Court to review the decision of the Ohio Supreme Court is conferred by 28 U.S.C. §1257(2). Upjohn is constrained by the record to submit that this Court has no jurisdiction because the judgment below is not a "final judgment" within the requirement of 28 U.S.C. §1257, *Republic Natural Gas Co.* v. *Oklahoma*, 334 U. S. 62 (1948), and does not present

any substantial Federal question which was either expressly or necessarily decided by the Supreme Court of Ohio.

Questions Presented

A. As to Jurisdiction

1. Whether the judgment of the Ohio Supreme Court is a final judgment within the meaning of 28 U.S.C. §1257 in view of the fact that the Ohio courts, pursuant to stipulation of counsel, reserved decision on a number of legal and disputed factual issues, including one of the most important issues raised by Hudson in this Court, *viz.*, the consistency of the Ohio Fair Trade Act of 1959 with *United States* v. *McKesson & Robbins, Inc.*, 351 U. S. 305 (1956).

2. Whether any of the Federal questions presented to this Court was actually or necessarily decided by the Ohio Supreme Court.

B. As to the Merits of the Appeal

If the above issues do not dispose of the appeal, the remaining questions are:

1. Whether the facts in this case establish any conflict between the Ohio Act, as applied to appellee Upjohn's distribution system, and the *McKesson & Robbins* case.

2. Whether there is any evidence in the record that Upjohn, pursuant to the Ohio Act, compelled its distributors to enter into "horizontal" price-fixing agreements.

3. Whether, under the facts in this case, the enforcement by Upjohn in Ohio of stipulated resale prices estab-

lished pursuant to the Ohio Act through *signed contracts* with some retailers in Ohio followed by *notice* to other retailers in Ohio, including Hudson, is permitted by the McGuire Act.

4. Whether the Ohio Act, under the facts in this case, is constitutional under the due process clause of the Fourteenth Amendment.

Statutes Involved

In addition to the statutes referred to by appellant (Brief p. 3 and Appendix A thereto), the following provisions 28 U.S.C. §1257 are involved in this case:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * * * *
>
> (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

The Appendix to this brief includes the McGuire Act, 66 Stat. 631, in the form enacted including the preamble as well as those portions codified in 15 U.S.C. §45(a)(1)-(5).

The Ohio Fair Trade Act of 1959 is printed in full in appellant's brief, Appendix A, pp. 88-95. For the convenience of the Court, the sections of that Act most directly involved in this case are printed in the Appendix to this brief.

Statement of the Case

A. Background of Fair Trade in Ohio

Ohio first adopted a Fair Trade Act in 1936. This Act permitted manufacturers of trade-marked or brand name goods to enter into resale price maintenance agreements with retailers and authorized such manufacturers to enforce the minimum resale price set in such express agreements against non-signing retailers. On January 22 1958 the Ohio Supreme Court, while upholding the legality of resale price maintenance agreements as such, held that the non-signer clause violated the Ohio Constitution as *inter alia* an illegal delegation of legislative power. *Union Carbide & Carbon Corp.* v. *Bargain Fair, Inc.*, 167 Ohio St. 182, 147 N.E. 2d 481 (1958). No Federal questions were discussed in that case.

Eighteen months later the Ohio Fair Trade Act of 1959 ("Ohio Act") was enacted to take effect on October 22 1959. Under the Ohio Act, a manufacturer such as Upjohn is permitted to enforce under Ohio law not only express contracts entered into with Ohio retailers who have signed resale price agreements but also contracts implied in law with non-signing Ohio retailers who purchase the manufacturer's goods and elect to retain the benefit of the use of the trade-mark after having received notice of the established resale price.

The validity of this concept of implied contract under *State* constitutional law was the most important question presented to the courts below and the only one decided by them.

B. Facts and Initial Pleadings

Unlike the *Lilly* case (No. 490); there was no agreed statement of facts in the case at bar. The essential facts

on the basic issue of the State constitutionality of the Ohio Act were established by the pleadings and affidavits and were not controverted by the parties. In respect of the Federal questions which Hudson now seeks to present to this Court there were factual disputes which were never resolved. The Ohio courts properly made no findings of fact on those issues because, as demonstrated in detail below, the parties stipulated to reserve those issues for future determination.[1]

In the summer of 1959 Upjohn, a manufacturer of pharmaceutical and other products identified by trade-marks (R. 14), entered into numerous written agreements with Ohio retailers establishing the stipulated resale price on Upjohn trade-marked goods as of the effective date of the Ohio Act (R. 25, 28). By circulars dated July 31 1959 (R. 4) Upjohn sent notice of these signed agreements to virtually all retailers in the state, including Hudson, which operates a retail drug store in Cleveland, Ohio. Although Hudson never signed an agreement with Upjohn it received the notice specified by the statute (R. 29). Hudson has admittedly sold, and continues to sell, Upjohn's goods at prices below the stipulated prices in Ohio (R. 15).

The decision sought to be reviewed herein arose out of Hudson's Second Amended Petition for Declaratory Judgment, filed January 11 1960 (R. 8). In this document Hudson alleged, with much specificity, that certain sections of the Ohio Act were unconstitutional on particularized State and Federal grounds. Hudson admitted in the Petition facts sufficient to establish a *prima facie* violation by it of the Ohio Act.

The principal question presented to the three State courts below was whether the Ohio Act, with its concept of

1. As a result, few of the detailed "facts" set forth in Hudson's Brief, pp. 13-23, can be treated as facts properly before this Court.

implied contract, overcame the State constitutional infirmities of the 1936 Act as found in *Bargain Fair*. Hudson, however, also alleged (Petition, heading B) that "certain portions" of the Ohio Act "as hereinafter specified" were void and beyond the power of the State legislature because they were in conflict with the Sherman Act and the McGuire Act (R. 11-12). Of the three alleged defects in the Ohio Act, only the first is now urged before this Court. In substance, Hudson claimed that §1333.29(A) of the Ohio Act *allegedly* provides that a proprietor may establish resale prices by notice alone, and that this provision is in conflict with the McGuire Act in that the latter *allegedly* permits the States to authorize only "contracts or agreements" prescribing minimum resale prices (Hudson's Question 1(c), Brief, p. 4). The second and third points were abandoned by Hudson and are not before this Court.[2] No mention was made in Hudson's Petition of Upjohn's distribution system or of its *del credere* wholesale agents.

Hudson also claimed (Petition, heading C) that various sections of the Ohio Act violate substantive due process under the Fourteenth Amendment (R. 12), and that (Petition, heading D) the void sections of the Act are so commingled with the rest that the whole Act is unconstitutional (R. 13). The questions presented to this Court include both of these claims (Hudson's questions 2 and 3, Brief, pp. 4-5).

2. In substance, these were that §1333.32(A) of the Ohio Act, which provides that it is unlawful for a non-signer with "notice" to sell below the minimum price, is in conflict with the McGuire Act in that the latter requires the non-signer to act "wilfully and knowingly"; and that §1333.32(B) of the Ohio Act, which permits suit by any person "reasonably anticipating damage", is in conflict with the McGuire Act in that under the latter suit may be brought only by a person "actually damaged" (R. 11-12).

Upjohn filed an answer denying that the Ohio Act was void (R. 14-15), and a Cross-Petition alleging breach of contract and unfair competition and asking for injunctive relief, money damages and costs (R. 15-24). Hudson filed a Reply to Upjohn's answer and an Answer to the Cross-Petition on March 8 1960. Hudson's first Answer to the Cross-Petition did not contain any affirmative defenses.

C. Upjohn's Motion for Summary Judgment

On April 19 1960 Upjohn moved under Page's Ohio Rev. Code Ann. §2311.041 (Supp. 1963) for summary judgment on the issues raised by Hudson's Petition and Upjohn's answer and upon Upjohn's prayer, in the Cross-Petition, for injunctive relief.[3] Upjohn filed supporting affidavits and alleged that there was no dispute about the material facts and that only questions of law were presented. Page's Ohio Rev. Code Ann. §2311.041(C) (Supp. 1963) authorizes the trial court on summary judgment to consider each aspect of the case separately and grant partial relief.

After Upjohn moved for summary judgment, but before the argument of the motion, Hudson filed on April 25 1960 an Amended Answer to the Cross-Petition in which for the first time two affirmative defenses were raised. The first, based on Federal law, alleged that Upjohn sold to retailers in competition with its wholesale distributors and that the last sentence of §1333.29(A) of the Ohio Act which authorizes such conduct is in conflict with the McGuire Act. This is the *McKesson & Robbins* point presented by Hudson's question 1(a), Brief p. 4.

3. Under the motion the matter of damages and attorneys' fees to which Upjohn might be entitled was reserved for later determination.

The second defense, based on State law, alleged waiver through non-enforcement against others.[4]

In support of its position on the motion, Hudson submitted its own affidavits and one deposition.[5] On May 2 1960 Upjohn served an affidavit controverting Hudson's factual allegations, particularly those relating to Upjohn's distribution system and its use of *del credere* agency agreements (R. 101-05). These conflicting affidavits created factual issues relating to that aspect of the case dealing with Upjohn's Cross-Petition for injunctive relief and Hudson's Amended Answer thereto raising the *McKesson & Robbins* point and waiver.

D. Reservation of Issues by Stipulation of Counsel

Before the oral argument on the motion for summary judgment which was heard on May 5 1960, counsel for both parties stipulated in open court that only the constitutional issues raised in Hudson's Petition and Upjohn's answer would be heard by the court, and the issues raised by Upjohn's Cross-Petition for injunction and Hudson's Amended Answer thereto (*McKesson & Robbins* and waiver) would be reserved for future determination. This stipulation eliminated the issues on which factual disputes were presented and enabled the court to proceed without trial on the basic legal issue of the validity of the Ohio Act under the Ohio Constitution. Hudson described this stipulation in its Brief in Support of Motion to Certify

4. Hudson served a Second Amended Answer to the Cross-Petition (R. 27-30) on June 16 1960 after the motion for summary judgment had been argued; however, there is no material difference, for purposes of review in this Court, between the Amended Answer and the Second Amended Answer.

5. Hudson's affidavits were filed between April 27 1960 and August 26 1960 (R. 368-70). The last, referred to in Hudson's Brief pp. 22-23, was filed after the trial court rendered its decision.

Record (pp. 3-4) filed in the Ohio Supreme Court, by means of which the questions of law presented by this phase of the case were brought before the Ohio Supreme Court:

> "Both The Upjohn Company and Eli Lilly & Company filed answers to plaintiff-appellant's petitions and also filed cross-petitions for damages, temporary injunctions and permanent injunctions. The Honorable Joseph H. Silbert, Judge of the Court of Common Pleas of Cuyahoga County, refused defendant-appellees' motions for temporary injunctions pending determination of the constitutionality of the Fair Trade Law.
>
> In order to narrow and thereby to expedite the determination of the issues before the Court, the parties agreed that the cases should be heard by the Court of Common Pleas on the issues raised by plaintiff-appellant's petitions for declaratory judgments and defendant-appellees' answers thereto. The litigation was therefore narrowed to the basic issue of the constitutionality of the new Fair Trade Law. The parties reserved for future determination the issues raised by defendant-appellees' cross-petitions and plaintiff-appellant's replies."[6]

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6. Similarly, in its Brief On the Merits (p. 4) filed in the Ohio Supreme Court, Hudson described the stipulation in this case in the following manner:

> "On May 2, 1960 the parties, by agreement, proceeded to trial solely on the allegations in Hudson's second amended petition, Upjohn's answer, and the reply thereto. The issues before the Trial Court were limited to the question of the constitutionality of the 1959 Fair Trade Law. All issues raised by Upjohn's cross-petition and Hudson's answer thereto were expressly reserved."

These stipulations are recited in Hudson's Jurisdictional Statement p. 7 and Appellant's Brief herein p. 15.

E. Joint Consideration with the *Lilly* Case (No. 490)

Each of the courts below considered this case jointly with the *Lilly* case and as presenting similar issues. Such parallel treatment reflected the fact that the cases were presented and decided upon limited issues only. In the *Upjohn* case the stipulation of counsel removed from the area of decision the *McKesson & Robbins* and waiver points raised by Hudson as affirmative defenses to the Cross-Petition for injunction. No affirmative defenses were pleaded at this time in the *Lilly* case (Lilly R. 18-19); the *McKesson & Robbins* point was never raised inasmuch as Lilly sells only to wholesalers and makes no sales to retailers (Lilly R. 19-20). Thus the two cases proceeded on the common issue of the constitutionality of the Ohio Act under the Ohio Constitution.

The trial court stated that the cases involved the "same questions" (R. 371). Similarly the Court of Appeals for Cuyahoga County concluded "Both cases involve similar facts and, with the questions to be determined by this Court the same in each case, the appeals will be considered together" (R. 380). The same conclusion was reached by the Supreme Court of Ohio, which stated that "The facts in both cases are similar and the law applicable is the same" (R. 413).

F. Decisions Below

The Ohio courts did not decide any Federal questions and no Federal question was necessarily passed on by implication. The trial court held that the concept of implied contract in the Ohio Act was void under the State constitu-

tion because of the unlawful delegation of legislative power condemned in *Bargain Fair* (R. 371-79). No other issue was decided. On appeal to the Court of Appeals for Cuyahoga County, the judgment was reversed, the Court holding by two to one vote that the implied contract theory was constitutional under the State constitution (R. 380-408). Neither the majority nor the dissenting opinions referred to any Federal question,[7] although the judgment recites that the Act was "neither in violation of the Constitution of the State of Ohio nor of the Constitution of the United States" (R. 412).[8] The case was remanded "for further proceedings according to law with respect to the cross-petition filed in this cause" by Upjohn (R. 412). On appeal to the Ohio Supreme Court, the judgment of the Court of Appeals for Cuyahoga County was affirmed by a minority vote. As Hudson here admits, the opinion of the Ohio Supreme Court "was concerned solely with the validity of the new Fair Trade Act under the laws of Ohio" and "never adverted to any issues concerning federal-state relationships in price fixing by private persons in interstate commerce" (Brief pp. 23, 27). After holding that the Ohio legislature under the Ohio Constitution, including Section 2, Article XIII, had the *power* to enact the Ohio Act under the known economic conditions (R. 419-23), the court stated (R. 423-24):

> "Two other matters are urged as to the constitutionality of this legislation.
>
> The first of these relate to the delegation of legislative power as to price fixing. . .

7. The dissenting judge said that the "single question" presented was whether the new Act overcame the decision in *Bargain Fair* (R. 406).

8. The judgment quoted in Hudson's Brief p. 2, is that rendered in the *Lilly* case (No. 490), not this case. The judgment in this case did not include the phrase "or of any law of the United States".

> The final contention is that such act violates the constitutional right of one to sell his own property on his own terms. . . . None of the constitutional attacks on this new act have merit."

Similarly, the opinion of the dissenting judges who thought the Ohio Act void under *Bargain Fair* (R. 424) did not mention any Federal questions. The judgment (R. 425) merely affirmed the judgment of the Court of Appeals. Nor was any Federal question raised in Hudson's application for rehearing filed with the Ohio Supreme Court. Hudson requested the three members of the court who voted to sustain the constitutionality of the Ohio Act to change their vote without necessarily changing their opinion in order to avoid problems of the Ohio Act's being constitutional in some counties in Ohio and unconstitutional in others.

Upjohn has not yet taken any action to move for trial of any of the reserved issues.

SUMMARY OF ARGUMENT

1. This Court does not have jurisdiction over this appeal for two separate reasons.

A. Lack of Finality

The courts below passed only on the common constitutional issues presented by the petitions for declaratory judgments in this case and the *Lilly* case (No. 490) and applicable to the undisputed facts common to both cases. Specifically, the trial court pursuant to stipulation of counsel reserved for future determination a number of legal and disputed factual issues, including the *McKesson & Robbins* issue raised by Hudson's first affirmative defense to Upjohn's Cross-Petition and

the disputed factual and legal issues connected with Upjohn's distribution system. The judgment of the Ohio Supreme Court is accordingly not a "final judgment" under 28 U.S.C. §1257.

B. No Federal Question

This appeal does not present any Federal question which was actually or necessarily decided by the Ohio Supreme Court.

The *McKesson & Robbins* question (Hudson's question 1(a)), relating to Upjohn's distribution system, was not before the courts below. Raised for the first time in Hudson's Amended Answer to Upjohn's Cross-Petition, it was excluded from decision by stipulation of counsel. Moreover, the question rested on disputed facts as to which the court made no findings. That this issue was not decided below is shown not only by the fact that it was not discussed in any of the opinions below, but also by the fact that the courts below treated this case and the *Lilly* case (No. 490) alike and the issue is not presented in the *Lilly* case.

The question relating to the assertion that §§1333.29 (B)(2) and (3) of the Ohio Act permits a proprietor to compel its distributors to enter into "horizontal" price-fixing agreements (Hudson's question 1(b)) is entirely hypothetical. The evidence in the record tendered no such question to the courts below and in fact the Upjohn *del credere* agreements specifically forbid the agents from controlling or attempting to control the prices at which their purchasers resell the goods. This question was never raised in any of the courts below with respect to Upjohn, and was raised for the first time with respect to Lilly in Hudson's reply brief in the Ohio Supreme Court.

The remaining McGuire Act question (Hudson's question 1(c)) relates to the allegation that the Ohio Act conflicts with the McGuire Act and the Sherman Act in authorizing the establishment of minimum resale prices by notice without the consensual agreement intended by Congress. This question is also hypothetical in that the undisputed facts show that Upjohn first established its minimum resale prices in Ohio by the use of written contracts with some retailers, and then gave notice to other retailers that it had established such prices by written contracts. Upjohn did not attempt to establish such prices by notice alone, and as shown below in the discussion of this point on the merits, Upjohn's activities are squarely within the terms of the McGuire Act. To the extent that Hudson is urging that the Ohio Act as written is defective in authorizing the establishment of resale prices by notice alone, it is asserting an interpretation of the Ohio Act neither made by the Ohio Supreme Court nor required to be made under the facts of this case.

The substantive due process question (Hudson's question 2), which in any event does not raise a substantial Federal question, was abandoned by Hudson and was not presented to any of the courts below as a Federal question. The claim of commingling (Hudson's question 3) is only ancillary and does not raise a Federal question at all.

In addition to the five questions tendered to this Court, Hudson makes a number of arguments based on the Lanham Trade-Mark Act and the Federal Food, Drug & Cosmetic Act (Brief pp. 36, 60, 72-76), none of which is properly before this Court.

2. Considered on the merits, none of the questions presented raises a real issue with respect to Federal law or the Federal Constitution.

Although its Brief is confused, Hudson apparently attempts to attack the Ohio Act on its face without regard to the facts in this case. The three McGuire Act questions urged by Hudson do not present any constitutional issues under the Supremacy Clause. The Federal antitrust laws apply to interstate commerce and any State fair trade statute as applied which conflicts with Federal law is unenforceable in situations involving interstate commerce Properly phrased, the real Federal issue presented by this appeal is whether the Ohio Act, as construed by the Ohio Supreme Court and applied to the facts in this case, is within the exemption of the McGuire Act. Hudson's suggestion that the Ohio Act is "void" and is "an attempt to repeal the McGuire Act" is *in vacuo* and groundless.

A. *McKesson & Robbins* Question (Hudson's Question 1(a))

Hudson claimed in its Jurisdictional Statement that Upjohn entered into resale price-fixing agreements with, and *sold* to, wholesalers with whom it competes and that such distribution system, established pursuant to the last sentence in §1333.29(A) of the Ohio Act, conflicted with §5(a)(5) of the McGuire Act and the *McKesson & Robbins* case. Hudson now admits that Upjohn's agreements with its *del credere* wholesale agents "retains in Upjohn the ownership of Upjohn products in the hands of such wholesalers" (Brief p. 18) and nowhere claims that the arrangements in fact involved *sales* to wholesalers. In this posture of the facts, Hudson can no longer claim (and no longer does so) that the Upjohn arrangement with its wholesalers was adopted pursuant to

§1333.29(A) of the Ohio Act in violation of §5(a)(5) of the McGuire Act. Instead, Hudson now appears to be arguing that apart from the Ohio Act and the McGuire Act, Upjohn's *del credere* agency agreements with its wholesalers violate the Sherman Act under *United States* v. *Masonite Corp.*, 316 U. S. 265 (1942). Such a claim, which is independent of any fair trade issue, was never presented below and is outside the scope of Hudson's petition for declaratory relief and this appeal.

In any event, Upjohn's use of *del credere* agents is sanctioned by *United States* v. *General Electric Co.*, 272 U. S. 476 (1926), and does not conflict with *Masonite*.

B. "Horizontal" Price-Fixing (Hudson's Question 1(b))

Hudson's second question was never raised in the *Upjohn* case in the Ohio courts. There are no facts in the record to support this claim and it is entirely hypothetical. Upjohn in its resale price maintenance program did not include in either its contracts with its retail distributors or its agreements with *del credere* agents the provisions authorized by §§1333.29(B)(2) and (3) of the Ohio Act allowing the proprietor of a trade-mark or trade name to compel its distributors to enter into further agreements with other distributors. By necessity, therefore, there was no evidence of any use by Upjohn of such provisions to compel "horizontal" price-fixing agreements. In any event, the Ohio Act does not, as a matter of State law, authorize the use of such provisions to compel "horizontal" price-fixing agreements.

C. Notice Provision (Hudson's Question 1(c))

With respect to the third McGuire Act question, the manner in which Upjohn established its Ohio price main-

tenance program was fully in accord with the applicable Federal laws. Pursuant to the Ohio Act, Upjohn established resale prices in Ohio by entering into written contracts (of unquestioned legality) with other retailers before giving notice to Hudson that it had signed contracts establishing fair trade prices in Ohio. Such a notice is enforceable against Hudson both under paragraph 2 and paragraph 3 of the McGuire Act (§5(a)(2) and (3)).

Paragraph 2 of the McGuire Act sanctions in interstate commerce resale price maintenance "contracts or agreements" which are lawful in intra-state commerce. The test of what are "contracts or agreements" under paragraph 2 is a matter of State law, and Ohio has ruled that notice to Hudson and Hudson's subsequent purchase and use of trade-marked goods constitute a voluntary contract under Ohio law. Hence such a contract is lawful under Federal law.

The Upjohn notice to Hudson is enforceable against Hudson independent of the implied contract theory upon which the courts below sustained the Act under the Ohio Constitution. Paragraph 3 of the McGuire Act expressly provides for enforcement against persons, whether or not parties to a contract or agreement, who receive notice of minimum resale prices established by contract with others. It is significant that nowhere in its brief does Hudson discuss this provision of the McGuire Act, which covers precisely the facts of this case.

To the extent Hudson is arguing that the McGuire Act requires the State statute to be a statute "of a kind" which requires, and not merely permits, the establishment of resale prices by written contracts or agreements, Hudson is disregarding the McGuire Act,

including its preamble, and the pertinent legislative history. Moreover, it is asserting an interpretation of the Ohio Act—that it is a statute allowing establishment of prices by notice alone—which was not necessary for the decisions below, has not been reached by the Ohio Supreme Court, and may well be the incorrect interpretation of the Ohio Act in interstate commerce situations.

D. Due Process (Hudson's Question 2)

The Ohio Act, as applied to Hudson, does not violate the due process clause of the Fourteenth Amendment.

E. Commingling (Hudson's Question 3)

The commingling argument does not raise a Federal question.

ARGUMENT

POINT I

This Court does not have jurisdiction of this appeal because the judgment below is not final and because the Ohio Supreme Court did not actually or necessarily decide any substantial Federal question.

A. The Judgment Below Is Not Final Because the Trial Court Reserved for Future Determination Factual and Legal Issues Raised by Hudson's Amended Answer to Upjohn's Cross-Petition.

Jurisdiction of this Court to review by appeal decisions of State courts is based upon 28 U.S.C. §1257(2). It is a prerequisite to such jurisdiction that the judgment appealed from be a "final" judgment by the highest state court authorized to hear the case. *Republic Natural Gas Co.* v. *Oklahoma,* 334 U. S. 62 (1948); *Radio Station WOW, Inc.* v. *Johnson,* 326 U. S. 120, 123-27 (1945).

The requirement of finality for the review by this Court of decisions from State courts has been imposed by Congress since 1789, when this Court was first granted the power to review such decision by §25 of the Act of September 24 1789, 1 Stat. 73, 85. The general rule under U.S.C. §1257 is that the judgment must terminate the litigation between the parties on the merits so that, if there were to be an affirmance by this Court, the court below would have nothing to do but to execute the judgment or decree it had already rendered. See *Georgia Ry. & Power Co.* v. *Town of Decatur,* 262 U. S. 432, 437 (1923); *Gospel Army* v. *Los Angeles,* 331 U. S. 543, 546 (1947). The judgment below must be complete and dis-

pose of all the elements of the controversy and not of merely interlocutory or intermediate steps. *Market St. Ry.* v. *Railroad Comm'n,* 324 U. S. 548, 551 (1945). A remand for a new trial, for example, is not a final judgment since on retrial the plaintiff can amend its complaint and present new facts. *Gospel Army* v. *Los Angeles,* 331 U. S. 543, 547 (1947).

Were this Court's jurisdiction not limited to "final" judgments from State courts,[9] litigants by means of piecemeal review would be free to come to this Court for "advisory" opinions on Federal questions which, after later proceedings, might prove unnecessary and irrelevant to a complete disposition of the litigation. *Pope* v. *Atlantic Coast Line R.R.,* 345 U. S. 379, 381-82 (1953); *Radio Station WOW, Inc.* v. *Johnson,* 326 U. S. 120, 123-24 (1945).

9. Although Congress has in some instances required finality with respect to this Court's jurisdiction over cases in the Federal courts, *e.g.* Section 2 of the Expediting Act, 32 Stat. 823, 15 U.S.C. §29 (1958); see *Brown Shoe Co.* v. *United States,* 370 U. S. 294, 304-11, 357-65 (1962), finality is not generally a prerequisite to jurisdiction of this Court over cases in lower Federal courts. See *e.g.* 28 U.S.C. §§1252, 1253, 1254, 1255, 1256 (1958). Similarly, the rule that Federal courts of appeal have jurisdiction from all "final decisions" of Federal district courts, 28 U.S.C. §1291 (1958), is a less strict finality doctrine than that under 28 U.S.C. §1257. See 28 U.S.C. §1292 (1958) allowing courts of appeal jurisdiction over certain interlocutory decisions from the Federal district courts. The strict interpretation of finality with respect to State courts as compared with Federal courts is not unrelated to the distinction between this Court's power to review only the Federal questions present in a case brought in the State courts and its general power to determine the entire case and controversy with respect to cases arising in lower Federal courts. See *Murdock* v. *City of Memphis,* 87 U. S. (20 Wall.) 590 (1875). Similarly, this Court's power of review is limited to the Federal issues raised before and decided by State courts although it has power to determine issues not decided by the lower Federal courts. See *McGoldrick* v. *Compagnie Generale Transatlantique,* 309 U. S. 430, 434-35 (1940).

Finality is a question for this Court to decide. *Department of Banking* v. *Pink,* 317 U. S. 264, 268 (1942) (*per curiam*). Unless Hudson can sustain the burden of establishing this Court's jurisdiction on appeal, the appeal must be dismissed. *Memphis Natural Gas Co.* v. *Beeler,* 315 U. S. 649, 651 (1942). On the record in this case, Hudson cannot sustain this burden.

The Court has now only one segment of the case at best. Before the trial judge heard either this case or the *Lilly* case, the parties had by stipulation reserved numerous issues in the manner set forth at pp. 9-10 above. The reserved issues in this case include those relating to Upjohn's distribution system and the applicability, if any, of the *McKesson & Robbins* case to Upjohn's use of *del credere* agents.

The purpose of this stipulation was to get an expeditious determination of the overriding State constitutional questions and to reserve for determination if necessary issues resting on disputed facts.

Without a trial of the disputed factual issues raised by the Cross-Petition and the Amended Answer thereto and by the conflicting affidavits,[10] the courts below could not develop a sufficiently full factual picture upon which to determine whether the alleged affirmative defenses, including the *McKesson & Robbins* point, were applicable. Further, these alleged defenses are only some of the affirmative defenses which, if applicable, Hudson would be free to urge upon the trial of the reserved portion of the case.

10. *Compare* affidavit of Hudson's counsel (R. 56-60), which purports to interpret a deposition of one of Upjohn's employees (R. 86-96), *with* a later affidavit by the same employee which attempts to correct only the most flagrant errors and inaccuracies in the affidavit of Hudson's counsel (R. 101-105).

The case thus does not have the requisite finality. As was stated by Justice Brandeis in *Collins* v. *Miller*, 252 U. S. 364, 371 (1920) (direct appeal from Federal district court), "Only one branch of the case has been finally disposed of below, therefore none of it is ripe for review by this court." "And the rule requires that the judgment to be appealable should be final not only as to all the parties, but as to the whole subject-matter and as to all the causes of action involved." 252 U. S. at 370. This conclusion is particularly relevant here since Hudson is free in this case (as was done in the *Lilly* case) to amend further its Answer to the Cross-Petition and add affirmative defenses which were not previously pleaded.[11] See *Gospel Army* v. *Los Angeles*, 331 U. S. 543, 547 (1947); *Richfield Oil Corp.* v. *State Board of Equalization*, 329 U. S. 69, 72-74 (1946).

Nor will there be any irreparable harm to Hudson if this Court dismisses the appeal and determines that the raising of any Federal question now is premature. See *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541, 546 (1949) and *Forgay* v. *Conrad*, 47 U. S. (6 How.) 201, 204 (1848) (review of lower Federal court decisions). Harm to Hudson of any nature would arise only from the moment the trial court enjoins further violations of the Ohio Act or orders Hudson to pay damages or costs. At the present time, all that has been determined is that the Ohio Act does not violate the Ohio Constitution. The trial court still must determine the validity of the defenses

11. In *Hudson Distribs., Inc.* v. *Eli Lilly and Co.*, 1963 Trade Cases ¶70,871 (Ct. of Common Pleas, August 7 1963), Hudson raised affirmative defenses for the first time on the trial of the second phase of the *Lilly* case. Similarly, to the extent that there is any merit in the Lanham Trade-Mark Act and related arguments belatedly urged in Hudson's Brief, pp. 36, 60, 72-76, such arguments raising Federal questions could be presented on the second phase of this case.

to Upjohn's Cross-Petition, both Federal and State, which Hudson has set up.

None of the opinions of this Court which have found the requisite finality in a State court judgment even though further proceedings were anticipated, *e.g. Radio Station WOW, Inc.* v. *Johnson,* 326 U. S. 120 (1945), permits a finding of finality here.[12] Nor does this case contain any of the peculiar factors present in *Local No. 438* v. *Curry,* 371 U. S. 542 (1963), or *Mercantile Nat'l Bank* v. *Langdeau,* 371 U. S. 555 (1963), wherein this Court held that the finality rule was satisfied.

Piecemeal review of selected anticipatory defenses raised by a complaint seeking a declaratory judgment, with the issues raised by counterclaim and reply thereto reserved, is entirely inconsistent with the history of 28 U.S.C. §1257 and this Court's limited review of Federal questions arising in State courts. Accordingly, this appeal must be dismissed as not final.

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12. "[S]uch a controversy is a multiple litigation allowing review of the adjudication which is concluded because it is independent of, and unaffected by, another litigation with which it happens to be entangled," *Radio Station WOW, Inc.* v. *Johnson,* 326 U. S. at 126. This is clearly not the situation in the present case. Nor does the judgment of the Ohio Supreme Court in this case (affirming the judgment of the court below which remanded for trial the issues raised on the Cross-Petition) fall in "that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated". *Local No. 438* v. *Curry,* 371 U. S. 542, 549 (1963); *Cohen* v. *Beneficial Industrial Loan Corp.,* 337 U. S. 541, 546 (1949). Neither is this a case in which for all practical purposes the litigation was terminated below for want of further defenses to offer in the State courts. See *Pope* v. *Atlantic Coast Line R.R.,* 345 U. S. 379, 382 (1953); *Local No. 438* v. *Curry,* 371 U. S. at 550-51. In this case, not only is the litigation not terminated, but the most substantial Federal question which Hudson alleges as a defense, the *McKesson & Robbins* issue, has been reserved.

B. None of the Federal Questions Raised by Hudson Was Actually or Necessarily Passed On by the Ohio Supreme Court.

Hudson has the burden of affirmatively proving that each of the questions presented for review in this Court was actually or necessarily passed on by the Ohio Supreme Court. See *Memphis Natural Gas Co.* v. *Beeler,* 315 U. S. 649, 651 (1942). Once a case is brought to this Court from State courts, review is limited to the specific Federal questions that were properly raised in the State courts. *Whitney* v. *California,* 274 U. S. 357, 362-63 (1927); *Dewey* v. *Des Moines,* 173 U. S. 193, 197-98 (1899). A Federal issue that was not raised or decided below may not be the subject of review even though it could have been raised, *Adler* v. *Board of Educ.,* 342 U. S. 485, 496 (1952), and a Federal question not timely raised in the State courts and not considered therein, cannot be considered by this Court. *Stembridge* v. *Georgia,* 343 U. S. 541, 547-48 (1952).

It is evident from a study of the record and the stipulation that none of the five questions urged on this Court was necessarily decided below. Neither opinion in the Ohio Supreme Court mentions any Federal question. Indeed, Hudson has admitted to this Court that the opinion of the Ohio Supreme Court "was concerned solely with the validity of the new Fair Trade Act under the laws of Ohio" (Brief p. 23).[13]

13. Hudson in its briefs below did seek to inject into the case two of the Federal questions relating to the McGuire Act now urged in this Court (the *McKesson & Robbins* question and the notice question, Hudson's questions 1(a) and 1(c)). In view of the nature of the proceeding below, Upjohn correctly stated in its briefs that with respect to such issues Hudson was presenting hypothetical or abstract questions or questions reserved for later determination. The fact that issues were briefed before the State courts does not establish that such issues were properly raised there. See *Live Oak Water Users' Ass'n* v. *Railroad Comm'n,* 269 U. S. 354, 358-59 (1926). In any event, question 1(b) (horizontal price-fixing) was never raised as to Upjohn.

That questions of State law only were decided is abundantly clear when each of Hudson's questions is examined separately.

1. The *McKesson & Robbins* issue (Hudson question 1(a)) was not properly before the courts below. It had been put up solely as an affirmative defense in Hudson's Amended Answer to Upjohn's Cross-Petition and, as such, had been specifically reserved by stipulation of counsel for later determination. Moreover, it rested on disputed facts as to which the court made no findings.

After Upjohn had filed its motion for summary judgment in the trial court on April 19 1960, Hudson filed an Amended Answer on April 25 1960 which raised the *McKesson & Robbins* question for the first time. Two days later Hudson's counsel filed a supporting affidavit (R. 56-60) purporting to interpret a deposition of one of Upjohn's employees. In response to the question whether one of Upjohn's wholesale agents, McKesson & Robbins, "*purchase* Upjohn products from Kalamazoo", the Upjohn employee replied, "They send their orders to the Cleveland Branch and the order is processed and all shipped from the Cleveland branch . . ." (R. 89) (emphasis added). The affidavit filed by Hudson's counsel said in paragraph 11 that "The witness further gave evidence that the products of The Upjohn Company are *sold* to various wholesalers which are independent business organizations; . . ." (R. 59) (emphasis added). On May 2 1960 Upjohn's employee filed an affidavit correcting the most "flagrant errors and inaccuracies" in the affidavit of Hudson's counsel (R. 101-05), attached a copy of its *del credere* agreements (R. 105-09), and stated that "This document speaks for itself and the relations with agency wholesalers are carried out in accordance with these terms" (R. 105). On this same day, a Vice President of Hudson filed an affidavit which said that McKesson &

Robbins, one of Upjohn's agents in Ohio, had not indicated it was acting as an agent and Hudson's affiliate at this time did not believe it was dealing with an agent (R. 70-72).

Thus, because of the stipulation limiting the issues, obvious factual disputes were not resolved by the courts below and the record made by the parties was limited and incomplete.[14]

2. The second issue set up by Hudson (question 1(b)) is the assertion that the Ohio Act attempts to repeal §5(a)(5) of the McGuire Act and §1 of the Sherman Act by authorizing the proprietor of a trade-mark or trade name to compel its distributors to enter into "horizontal" price-fixing agreements with other distributors. This question was never raised in any of the courts below with respect to Upjohn.

Presumably this allegation relates to the effect of §§1333.29(B)(2) and (3) of the Ohio Act which authorize the proprietor of a trade-mark to require a distributor with whom he has entered into a resale price maintenance agreement to make a similar agreement with other distributors to whom he may resell. As applied to the facts of this case, such an allegation is doubly hypothetical. Upjohn's contracts with its retail distributors and with its *del credere* wholesale agents (R. 25, 105) contain no such provisions, and in fact Section 6 of the *del credere* agreements specifically forbids any such price control by the agents (R. 107). It is clear that Upjohn has not sought to take advantage of

14. When and if the injunction issue is reached in the reserved phase of the case, the evidence will show that Upjohn discontinued using *del credere* agents in December 1961 and since that time has sold to wholesalers without attempting to set resale prices at the wholesale level of distribution.

§§1333.29(B)(2) and (3) and in its contracts has confined itself to the basic resale price maintenance provision of §1333.29(B)(1). Further, this argument by Hudson rests on a questionable interpretation of §1333.34 of the Ohio Act not made by the Ohio Supreme Court and makes §1333.34, which forbids horizontal price-fixing, meaningless.

3. The third issue tendered by Hudson (question 1(c)) is the claim that the Ohio Act is violative of the Supremacy Clause in that "the Act attempts to repeal Sections 5(a)(2), (3), (4) and (5) of the McGuire Act and Section 1 of the Sherman Anti-Trust Act by authorizing the 'proprietor' of a trademark or trade name, who need not necessarily be the owner thereof, to establish minimum resale prices by notice to distributors without the consensual agreement intended by Congress" (Brief, p. 4). Thus stated, the question is purely hypothetical.[15] The facts as admitted by the pleadings show that Upjohn, which owns the trade-marks in question, first entered into written contracts with a number of retail distributors of its trade-marked products in Ohio establishing certain retail prices for such products and thereafter gave notice to Hudson of the retail prices so established. Whether a person who is *not* the owner of the trade-marks involved could enforce the Ohio Act is of purely academic interest in the present case. Similarly, the situation which

15. In *Schwegmann Bros. Giant Super Markets* v. *Eli Lilly & Co.*, 205 F.2d 788, 792 (5th Cir.), *cert. denied*, 346 U. S. 856 (1953), the defendant claimed that under Louisiana law there was no requirement that the fair trade contracts be made by the brand owner. Since this question was not raised by the facts in the case, the Fifth Circuit held this a hypothetical question that should await the clarification and construction of the state statutes by the Louisiana courts, citing *Alabama State Federation of Labor* v. *McAdory*, 325 U. S. 450 (1945); *Rescue Army* v. *Municipal Court*, 331 U. S. 549 (1947); and *Watson* v. *Buck*, 313 U. S. 387 (1941).

would have prevailed had Upjohn *not* entered into contracts with other retail distributors in Ohio before giving notice to Hudson is not presented to this Court, nor was it decided by the courts below.

In developing this argument appellant has somewhat changed the focus of the point although it is difficult to determine what precisely is being urged. We do not think it is necessary for this Court to consider the various sub-arguments which Hudson is apparently urging (although we have attempted to set them forth and analyze them later in this brief).[16] It is sufficient to note that (with the possible exception referred to in the next paragraph) the arguments and sub-arguments are premised on the wholly suppposititious case of one who is not the owner of a trade-mark attempting to employ the Ohio Act to establish *by notice alone* (without any prior written contracts) a resale price maintenance program in Ohio with respect to items being sold in interstate commerce. This is *not* the case presented to and decided by the courts below, nor is it the case presented here.

The possible exception referred to above is an apparent attempt by Hudson to argue that paragraph 3 of the McGuire Act (§5(a)(3)), which authorizes the States to permit action by proprietors against persons whether or not a party to a contract, not only requires resale prices to be established in the first instance by written contracts (as Upjohn did in this case) but also requires the State statute itself to be a type of statute which requires, and not merely permits, the establishment of such prices by written contracts. See Hudson's Brief pp. 30, 49. We believe that any such reading of the McGuire Act and its relationship to the Ohio Act would be completely untenable.[17]

16. See pp. 42-50, below.
17. See pp. 47-50, below.

But even if Hudson were right, it could not establish that this Court has jurisdiction to hear this question. The contention is premised on an interpretation of the Ohio Act neither expressly made by the Ohio Supreme Court nor necessary for its decision, *viz.* that the Act permits establishment of resale prices in interstate commerce by *notice alone* (without any prior written contracts). Although the Ohio Supreme Court did not construe this aspect of the Ohio Act, Hudson nevertheless asks this Court to adopt a construction which would assure its unconstitutionality on Hudson's theory of the McGuire Act. This Court has refused to accept jurisdiction under such circumstances. The controlling principle was laid down in *Alabama State Federation of Labor* v. *McAdory*, 325 U. S. 450, 470 (1945):

> "State courts, when given the opportunity by the presentation to them for decision of an actual case or controversy, may, and often do, construe state statutes so that in their application they are not open to constitutional objections which might otherwise be addressed to them. [Citations] In advance of an authoritative construction of a state statute, which the state court alone can make, this Court cannot know whether the state court, when called on to apply the statute to a defined case or controversy, may not construe the statute so as to avoid the constitutional question. For us to decide the constitutional question by anticipating such an authoritative construction of the state statute would be either to decide the question unnecessarily or rest our decision on the unstable foundation of our own construction of the state statute which the state court would not be bound to follow. [Citations]"

Hudson can maintain this Court's jurisdiction over this question only if it is able to establish (i) that the

interpretation of the McGuire Act was passed on by the Ohio Supreme Court, (ii) that the question was resolved adversely to Hudson, and (iii) that the Ohio Act was interpreted so as to make it unconstitutional under Hudson's view of the McGuire Act. Absence of *any* of these steps would be fatal. *All* of them are absent.

4. The "commingling" point (Hudson question 3) raises a question as to whether the allegedly unconstitutional sections of the Ohio Act are severable from the constitutional sections. This is purely a question of State law, not a Federal question. See p. 52, below.

5. Although substantive due process (Hudson question 2) was raised in Hudson's Petition, this question was not discussed in Hudson's brief in the trial court and was abandoned in the Court of Appeals and the Ohio Supreme Court. In those courts, only State due process questions were raised. Having been abandoned below it cannot be raised in this Court. *Herndon* v. *Georgia,* 295 U. S. 441 (1935). In any event, the unanimous opinion of this Court in *Old Dearborn Dist. Co.* v. *Seagram-Distillers Corp.,* 299 U. S. 183 (1936), has foreclosed this issue. The economic wisdom of State statutes is no longer a judicial question under the due process clause of the Fourteenth Amendment. *Ferguson* v. *Skrupa,* 372 U. S. 726 (1963). Thus, even if due process had been preserved as a Federal question, it does not raise a substantial question which would support jurisdiction. *Palmer Oil Corp.* v. *Amerada Petroleum Corp.,* 343 U. S. 390 (1952); *Zucht* v. *King,* 260 U. S. 174 (1922).

Therefore, appellant cannot sustain its burden that the Federal questions urged on this Court were properly raised in the Ohio Supreme Court and in fact passed on there. Accordingly, this appeal should be dismissed even

were the Court to decide that the judgment is otherwise "final" under §1257.

Dismissal is also required under the holdings in *Alabama State Federation of Labor* v. *McAdory,* 325 U. S. 450 (1945); *C.I.O.* v. *McAdory,* 325 U. S. 472 (1945); and *Rescue Army* v. *Municipal Court,* 331 U. S. 549 (1947). In *Alabama State Federation of Labor* the principal question was whether "petitioners' contentions are so related to any case or controversy presented by the record that this Court may appropriately pass upon them in a declaratory judgment proceeding." 325 U. S. at 453-54. After noting that the State court had not fully construed the sections of the State statute and had not applied the statute to a concrete set of facts so that this Court would know how the statute should be construed, the opinion continued:

> "Obviously, no decision of the constitutional issues now posed could be made in this suit, and no opinion could be written, without considering all and deciding some at least of these questions of statutory interpretation. No state court has decided them, briefs and argument offer us little aid in their solution, and no solution which we could tender would be controlling on the state courts. The record supplies us with no concrete state of facts to which the challenged sections, when construed, could be applied." (325 U. S. at 459-60)

This unanimous holding is particularly applicable in the case at bar where the Ohio Supreme Court has never interpreted or construed the Ohio Act in the areas in which the Federal challenges are made by Hudson.

POINT II

Considered on the merits, none of the questions presented raises a real issue with respect to Federal law or the Federal Constitution.

Although Hudson purports to present five Federal questions to this Court, three involving the McGuire Act (Hudson's questions 1(a), 1(b), and 1(c)), one involving due process, and the last an ancillary question at best, Hudson fails to correlate these questions with its argument here or to specify the legal premise of its basic contentions. Hudson seems to waver between attacking the Ohio Act on its face and alleging its invalidity as applied to the facts of this case.

Hudson misconceives the essential nature of its Supremacy Clause argument in persistently claiming that the Ohio Act is "void" and that the Ohio Act could only have been passed by Congress. The Federal antitrust laws including the fair trade "enabling" statutes do not void "unauthorized" State fair trade laws but only make them unenforceable as applied in interstate commerce situations. In this case the only issue which can properly be raised by Hudson under the Federal antitrust laws is whether the Ohio Act, as construed by the Ohio Supreme Court and applied to the facts in this case, is within the exemptions of the Miller-Tydings Act and McGuire Act.

The discussion below deals with these questions in the order listed in Hudson's Questions Presented. It does not include a discussion of the asserted conflicts of the Ohio Act with the Lanham Trade-Mark Act, 60 Stat. 427, as amended, 15 U.S.C. §1051 *et seq.* (1958 and Supp. IV, 1963), or the Federal Food, Drug and Cosmetic Act, 52

Stat. 1040, as amended, 21 U.S.C. §301 *et seq.* (1958) (Brief pp. 36, 60, 72-76). These arguments were not considered below and were not mentioned in either the notice of appeal (R. 426-27) or the Jurisdictional Statement. They are thus not properly part of this appeal. [18]

A. On the Facts Before the Courts Below, There is No Evidence that Upjohn's Distribution System was in Conflict with the *McKesson & Robbins* Case (Hudson's Question 1(a)).

In persuading this Court to entertain this appeal, Hudson's principal attack was that the Ohio Act and Upjohn's distribution system were in conflict with §5(a)(5) of the McGuire Act and the doctrine of *United States* v. *McKesson & Robbins, Inc.*, 351 U. S. 305 (1956).

In its Jurisdictional Statement, Hudson alleged

> (i) that §1333.29(A) of the Ohio Act, which allows a proprietor under certain circumstances to establish minimum resale prices for his wholesale distributors even though he sells to retailers in competition with them, conflicts with the *McKesson & Robbins* case and *Esso Standard Oil Co.* v. *Secatore's, Inc.*, 246 F. 2d 17 (1st Cir.), *cert. denied*, 355 U. S. 834 (1957);
>
> (ii) that this provision was designed to aid "manufacturers such as the Upjohn Company, who sell directly to retailers, while at the same time *selling* to wholesalers with whom they compete for the retailer's business" (emphasis added) (p. 11);
>
> (iii) that "Upjohn has availed itself of the horizontal price-fixing provisions of the Ohio Act by entering into agreements with wholesalers of its products with whom it competes and by fixing

18. Rules 10(2)(c), 15(1)(c) and 40(1)(d)(2) of this Court. *Cf. General Talking Pictures Corp.* v. *Western Electric Co.*, 304 U. S. 175, 177-79 (1938).

> wholesale resale prices to retailers. Upjohn calls these agreements '*del credere* agency' contracts. . . The titles given to these agreements with wholesalers cannot mitigate their true nature as horizontal price-fixing agreements among competing wholesalers and manufacturers in violation of the Sherman Act" (pp. 14-15).

It is not entirely clear from the Hudson brief what argument is now being made on this point. Although the *del credere* agency arrangements are still referred to (Brief pp. 37, 78), Hudson does not contend that Upjohn *sells* to the *del credere* agents but concedes that the agency agreement "retains in Upjohn the ownership of Upjohn products in the hands of such wholesalers" (Hudson Brief p. 18). Nor does the claim any longer appear that Upjohn's consignment arrangements with wholesalers are not true agency relationships.

Hudson's acknowledgment of Upjohn's relationship with its agents is dictated by the state of the record, for none of the factual allegations quoted above from the Jurisdictional Statement had been supported by any findings of fact or uncontroverted evidence below. The basic issue itself had been reserved by stipulation of counsel and, even without the stipulation, the affidavits and deposition, which incompletely and briefly discuss certain aspects of the Upjohn distribution system, raised material issues of fact. See pp. 26-27 above. These issues would have to be developed by the parties and resolved before a ruling could properly be made on Hudson's affirmative defense alleging the illegality of Upjohn's use of *del credere* agency agreements.

Although Hudson retains the allegation that one of Upjohn's agents, McKesson & Robbins, Inc., is a "com-

peting wholesaler" of Upjohn (Brief pp. 16, 37, 78), there is no evidence in the record to support this allegation. McKesson & Robbins' salesmen and salesmen from Upjohn's Cleveland branch may call on some of the same pharmacists, but since Upjohn's goods are only consigned to its agents and not sold, these agents are not wholesalers in the conventional sense of the term. At most the allegation that McKesson & Robbins is a competing wholesaler is a disputed issue of fact which requires a determination by a trier of fact.

In any event it is clear that Hudson in its brief to this Court has changed the argument made in its Jurisdictional Statement. Hudson no longer contends that Upjohn availed itself of that provision in §1333.29(A) of the Ohio Act which permits a manufacturer to set resale prices with wholesalers with whom it is in competition on sales to retailers.

Indeed, Upjohn has never relied on that provision nor suggested that any proprietor of a trade-mark could rely on it in interstate commerce. As Upjohn did not sell to wholesalers it did not attempt to establish fair trade prices at the wholesale level. This is demonstrated by the Upjohn "Wholesale Catalogue" (Hudson's Exhibit 5; R. 433-64) which provides solely for the establishment of *retail* fair trade agreements (R. 437). The portions of the catalogue setting forth prices clearly distinguish between the price at which Upjohn's agents sell the goods ("price to retailer"), and the stipulated "minimum resale price" of which notice is given in the catalogue.[19] The only minimum resale prices are those charged by retailers

19. See *e.g.* the prices listed for Kaopectate (R. 458). The price to the retailer is $.63 for six ounces, the minimum resale price being $.81.

to consumers, not by wholesalers on sales to retailers (R. 437).[20]

Nor is it at all clear that the Ohio courts, if faced with the question, would determine that the challenged part of §1333.29(A) is applicable in interstate commerce. In view of the *McKesson & Robbins* case, it would clearly be open to the Ohio courts in a proper case to limit the applicability of this provision to intra-state transactions. The Ohio courts, however, have so far not been called upon to pass on this point.

Finally, although the issue is not here, Upjohn's use of *del credere* agents is valid under the antitrust laws. This Court in *United States* v. *General Electric Co.*, 272 U. S. 476 (1926), upheld the right of a manufacturer to maintain resale prices by selling through wholesale and retail agents. The key question was one of fact, whether the dealers were *bona fide* agents.[21] The Upjohn agency agreement (R. 105-09) satisfies all the normal indicia of an agency relationship, as Hudson has apparently now conceded. Except for the affidavit of Hudson's counsel which was refuted in full by Upjohn (see p. 26 above), there is no evidence in the record that the relationship is in fact one of vendor-vendee rather than principal-agent.

20. Hudson has erroneously interpreted a rather ambiguous colloquy in the deposition of Vern L. Smith (R. 95-96) as establishing that Upjohn organized price maintenance at the wholesale level by notice to wholesalers (Brief pp. 37 and 78); but it is clear that wholesale agents have been given no notice of any fair-traded prices other than the retail prices (R. 437). See also Mr. Smith's later affidavit (R. 105). As Upjohn did not sell to wholesalers, it did not attempt to establish fair trade prices at such level.

21. In 1948 the Government claimed that even if the General Electric contracts had originally established *bona fide* agencies, this relationship was no longer maintained. This contention was rejected. *United States* v. *General Electric Co.*, 82 F. Supp. 753, 817-27 (D. N. J. 1949).

Appellant alleges that Upjohn's *del credere* agency relationships "appear" to violate the rule of *United States v. Masonite Corp.*, 316 U. S. 265 (1942). Such a contention is unsupported by any record facts and is outside the issues of the validity of the Ohio Act and its relationship to the McGuire Act. Nowhere raised in the court below, the *Masonite* argument is an independent attack under the Sherman Act on Upjohn's *del credere* arrangements. As such, this argument is beyond the scope of this case as posed by Hudson in its petition for a declaration of the constitutionality of the Ohio Act. Certainly, a Sherman Act inquiry into the validity of a distribution system requires a delineation of such issues at the trial level and the opportunity to adduce evidence on material facts, which was never present in this case.

In any event, the *Masonite* case is inapposite. *Masonite* held that the Sherman Act is violated where a manufacturer appoints most of the competitors in an industry as his agents to sell; the market effect of the designation was thus widespread, combining substantially all the competitive sellers under one roof and requiring all to deal in the products of one manufacturer at uniform prices—a situation not even remotely approached by the case at bar.

B. Hudson's Assertion that the Ohio Act Allows Upjohn to Compel its Distributors to Enter into "Horizontal" Agreements is Unrelated to the Facts in the Case and Unsupported by Any Evidence in the Record (Hudson's Question 1(b)).

Hudson's persistence in attacking the bare language of the Ohio Act completely divorced from the facts of this case is nowhere more evident than with respect to its second McGuire Act argument in which it has seized

upon two sub-sections of § 1333.29(B) of the Ohio Act and attempted to read into the bare words of these sub-sections authorizations for illegal horizontal price-fixing agreements.[22] See *e.g.* Hudson Brief pp. 57-60. Its argument is as follows: Section 1333.29(B) provides that a contract or notice *may* contain clauses (2) and (3) which allow a proprietor to require a distributor with whom he contracts to enter into the same agreement with another distributor to whom the first distributor may resell; the definition of the term "distributor" in § 1333.28(E) *could* include a sale by a retailer to another competing retailer; *ergo*, §§ 1333.29(B)(2) and (3) permit horizontal price-fixing and are void under the Supremacy Clause since the McGuire Act and Miller-Tydings Act specifically forbid "horizontal" agreements.

This argument is quite unreal in the context of this record. Sub-sections (2) and (3), when and if used by a proprietor, are undoubtedly designed to give protection in a multi-tier vertical distribution system, in addition to the

22. Section 1333.29(B) provides:

"(B) Any such contract or notice may contain the following provisions:

(1) That the buyer will not resell such commodity at less than the minimum resale price stipulated by the proprietor thereof for the level of distribution at which the buyer resells the same;

(2) That the buyer will require from any distributor to whom he may resell such commodity an agreement that such distributor will not, in turn, resell such commodity at less than the minimum resale price stipulated by the proprietor thereof for the level of distribution at which such distributor resells and that such distributor, if he resells to another distributor, will make the same agreement with the distributor to whom he may resell;

(3) That the seller will require from any other distributor to whom he may sell other items of such commodity an agreement that such distributor will not, in turn, resell such commodity at less than the minimum resale price stipulated by the proprietor for the level of distribution at which such distributor resells and that such distributor, if he resells to another distributor, will make the same agreement with the distributor to whom he may resell."

basic agreement by the buyer that the buyer will not resell the commodity at less than the stipulated price, as authorized by sub-section (1). As Upjohn sold only to retailers, either directly or through *del credere* agents, it had no need of the provisions authorized by sub-sections (2) and (3) and did not use them.

Upjohn's relevant Retailer Agreement is in the record (Exhibit 1 to Answer, R. 25-26). It does not contain a single clause justifying appellant's argument on this point. It contains no clause by which the retailer is either authorized or compelled to enter into further agreements with other distributors. *A fortiori,* these signed documents do not compel—or authorize—horizontal price-fixing. The sole price maintenance provisions in these signed agreements are one-tier and vertical. Upjohn "established stipulated minimum retail prices in Ohio" (R. 25), which are those designated in its catalogue, and the retailer has thereby agreed not to sell *at retail* Upjohn trade-marked products for less than the minimum resale price stipulated by Upjohn (R. 26).

Neither of the circulars sent out by Upjohn, which gave notice of the prices established by the signed agreements, contained any clause which could remotely be considered as allowing or compelling horizontal agreements (R. 4, 27). Similarly there is nothing in Upjohn's *del credere* agency agreement (R. 105-09) which even arguably authorizes or compels such agents to enter into agreements with other distributors. To the contrary, the agency agreement provides (R. 107):

> "6. Agent has no authority to dispose of any of the goods received by him upon consignment except as above provided and shall not control or attempt to control prices at which any purchaser from agent shall sell any of such consigned goods purchased from agent."

Hudson has not pointed to anything in Upjohn's agreements, the circulars or any of the affidavits or the deposition which even alludes to the possibility that Upjohn compelled its retail distributors to enter into agreements with others, much less into horizontal price-fixing agreements. Its whole argument is *in vacuo*.

Further, this argument turns on a very questionable interpretation of the Ohio Act not sanctioned by any Ohio decision. Section 1333.34 provides that the Act "shall not, except as otherwise *specifically* provided in section 1333.29 of the Revised Code, apply to any contract, agreement, or understanding between or among producers, or between or among distributors, or between or among wholesalers" (emphasis added). This section prohibits horizontal price-fixing except as otherwise specifically provided in §1333.29. The exception brings in the provision of §1333.29(A) authorizing a proprietor to establish minimum resale prices for his wholesale distributors under certain circumstances even though he sells to retailers in competition with such distributors "notwithstanding section 1333.34 of the Revised Code". The exception does not extend to §§1333.29(B)(2) and (3) which neither specifically provide for their applicability in horizontal price-fixing situations nor cross-refer to §1333.34. Yet, as interpreted by Hudson, the exception swallows up the provision and makes §1333.34 as a whole meaningless.

In the absence of a construction of a State statute by the State courts, this Court should not construe the statute to be unconstitutional if it is possible to avoid a constitutional problem. *Alabama State Federation of Labor* v. *McAdory*, quoted at p. 30 above. The statutory language here involved has not been construed by the Ohio Supreme Court. It clearly *can* be construed in such a way as to avoid the hypothetical problem raised by

Hudson, and would have to be given a strained construction even to raise the problem.

For all these reasons, this "Federal" claim invoked by appellant has no basis.

C. The Manner in which Upjohn Established its Ohio Resale Price Maintenance Program was Fully in Accord with the Ohio Act and Federal Law (Hudson's Question 1(c)).

Upjohn established its stipulated minimum prices in Ohio by entering into signed agreements with various retailers (R. 25-26) and then sent notices to retail pharmacists in the state announcing that it had "signed new Fair Trade contracts establishing minimum retail prices in Ohio" (R. 4). This procedure followed to the letter the Ohio Act which provides: '"It shall be lawful . . . for a proprietor to establish and control by notice to distributors or by contract, stipulated minimum resale prices for a commodity . . ." §1333.29(A).

Under the enforcement provision of the Ohio Act, §1333.32(A), Upjohn then became entitled to enforce the stipulated minimum prices which it had established by written contracts against (i) "any distributor who is in contract with" Upjohn and (ii) "any distributor with notice that [Upjohn] has established a stipulated minimum resale price." The Ohio Supreme Court has determined that the enforcement by Upjohn of the stipulated minimum resale prices against those, such as Hudson, who have not actually signed a contract or agreement is constitutional under the Ohio Constitution since the legislature has determined by the definition of the word "contract" in §1333.28(I) that distributors who buy with notice of established prices and use a proprietor's

trade-mark have impliedly agreed not to sell below those prices.

The opinion of the Ohio Supreme Court recognized that the "heart" of the Ohio Act was the doctrine of implied contract in §1333.28(I) and noted that a person who acquired a brand-name commodity "after actual notice that the proprietor has *established* a minimum resale price is bound to observe *that price*" (R. 415, emphasis added). Later, the court added that the provision was the "core of the act" and "it provides in essence that, when a retailer with notice that an item *has been fair-traded* procures it for resale, he is deemed to have entered into an implied contract . . ." (R. 417, emphasis added).

The State court concluded that Upjohn's method of establishing prices complied with the Ohio Act in a fact situation involving (i) signed agreements followed by (ii) notice that Upjohn had established stipulated prices by written contracts and (iii) use of the Upjohn trade-mark by Hudson after receipt of such notice.

Hudson obfuscates the real issue involved in this case by ignoring the clear sanction of paragraph 3 of the McGuire Act (§5(a)(3)). Paragraph 3 provides that Upjohn can enforce its minimum resale prices against Hudson whether Hudson "is or is not a party" to a contract.

There are actually two paragraphs of the McGuire Act involved in this case. The first is paragraph 2 which in the provisions pertinent here states that nothing in the Federal antitrust laws

> ". . . shall render unlawful any contracts or agreements prescribing minimum or stipulated prices . . . when contracts or agreements of that description are lawful as applied to intrastate transactions under any statute, law, or public policy now or hereafter in effect in any State . . ."

The second is paragraph 3, which as far as pertinent here, provides that the Federal antitrust laws shall not render unlawful the enforcement

> ". . . of any right or right of action created by any statute, law, or public policy now or hereafter in effect in any State . . . which in substance provides that . . . selling any commodity at less than the price or prices prescribed in such contracts or agreements whether the person so . . . selling is or is not a party to such a contract or agreement . . . is actionable at the suit of any party damaged thereby."

These paragraphs were designed to restore the effectiveness of State Fair Trade Acts "by making it abundantly clear that Congress means to let State fair-trade laws apply in their totality; that is, with respect to nonsigners as well as signers" H.R. Rep. No. 1437, 82d Cong., 2d Sess., p. 2 (1952).[23] Although Hudson attacks the Ohio Act as in violation of Federal law, never once in its brief is the scope or purpose of paragraph 3 of the McGuire Act discussed. Reference to *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U. S. 384 (1951), and the Miller-Tydings Act (Brief p. 50) is hardly relevant.

Moreover, the Ohio statute, as applied in this case, comes within the very language of the McGuire Act and the purpose as stated in §1 of the Act (66 Stat. 631-32):

> "*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That it is the purpose of this Act to protect the rights of States under the United States Constitution to regulate their internal affairs

23. "Under all these circumstances, the committee feels amply justified in recommending enactment of H.R. 5767, as amended, which would permit the several States to experiment further with fair-trade legislation." H.R. Rep. No. 1437, 82d Cong., 2d Sess., p. 5 (1952).

> and more particularly to enact statutes and laws, and to adopt policies, which authorize contracts and agreements prescribing minimum or stipulated prices for the resale of commodities and to extend the minimum or stipulated prices prescribed by such contracts and agreements to persons who are not parties thereto. It is the further purpose of this Act to permit such statutes, laws, and public policies to apply to commodities, contracts, agreements, and activities in or affecting interstate or foreign commerce."

If the *implied* contract between Hudson and Upjohn, which is a valid Ohio contract, is included in the phrase "contracts or agreements" in paragraph 2 of the McGuire Act, then it is lawful for Upjohn to enforce such contract or agreement against a person who *is* "a party to such contract or agreement" under paragraph 3. While at the time this Court decided *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U. S. 384 (1951), no state Fair Trade law incorporated the concept of an implied contract to bind non-signers, an implied contract is now a legally enforceable contract in Ohio and Virginia. Since paragraph 2 of the McGuire Act exempts from the antitrust laws any contracts or agreements which "are lawful as applied to *intrastate* transactions under *any statute, law, or public policy now or hereafter in effect in any State*," this Court must look to State law to see whether the implied "contract or agreement" between Hudson and Upjohn qualifies under the McGuire Act. Since a notice of the established prices plus the purchase and use of a proprietor's brand name products creates a valid contract under Ohio law, such a contract qualifies under paragraph 2 of the McGuire Act and is enforceable against "a party to such a contract" under paragraph 3.

The very text of paragraph 2 of the McGuire Act as well as its legislative history compels the conclusion that the "contracts or agreements" thereby carved out as lawful exceptions from the antitrust statutes are such "contracts or agreements" as State law recognizes or creates. Indeed, contracts or agreements by implication of law are among the oldest heads of the common law. Nothing in *Schwegmann* forecloses the possibility that, if the Louisiana law had implied a voluntary contract with respect to the resale of trade-marked articles upon purchase of the goods after notice of the resale price, the Miller-Tydings Act would have been held to exempt such a contract.[24] This has been recognized by the Virginia court. See *Standard Drug Co.* v. *General Electric*, 202 Va. 367, 117 S.E. 2d 289, 298-99 (1960), *appeal dismissed*, 368 U. S. 4 (1961). However that may be, Congress has now made abundantly clear by the language and purposes set forth in the McGuire Act, as passed, 66 Stat. 631-32, that the term "contract" would be governed by State law.

Even if the "implied contract" recognized by the Ohio Act is held not to be within the meaning of "contracts or agreements" in paragraph 2 of the McGuire Act, paragraph 3 provides separate and independent sanction for enforcement against Hudson. Upjohn is entitled under paragraph 3 to enforce against Hudson the stipulated prices established by the written contracts with other retailers, even though Hudson is a person "not a party to such [written] contract or agreement." As indicated above, the McGuire Act was enacted to make clear that Federal laws permit enforcement against such a person.

24. The Senate Report accompanying the Miller-Tydings Act, S. Rep. No. 2053, 74th Cong., 2d Sess., at p. 2 (1936) stated that "the bill does no more than remove Federal obstacles to the enforcement of contracts which the States themselves have declared lawful".

Thus, under Ohio law Upjohn can enforce established prices against Hudson since Hudson is deemed to be bound by implied contract, while under Federal law it does not matter whether Hudson is bound by contract or not. Since Federal policy allows enforcement against persons who are not parties to a contract, it clearly allows enforcement in this case where the State legislature and courts have found Hudson to have voluntarily contracted.

Hudson apparently makes one further argument—that the McGuire Act demands that the State pass a statute "of a kind" which requires, and not merely permits, the establishment of resale prices by written "contracts or agreements" before a party can enforce "such a contract or agreement" under paragraph 3. See Hudson's Brief pp. 35-36, 49, 67. Such a contention finds no support in the history of the Miller-Tydings and McGuire Acts, the policy behind them, or the language of either act.

It is clear from the identical language of the Miller-Tydings Act and paragraph 2 of the McGuire Act—"when contracts or agreements of that description are lawful as applied to intrastate transactions under any statute, law, or public policy now or hereafter in effect in any State"—that the Congress laid down no special form of State statute as a necessary foundation for the operation of those acts. Both of them were "enabling" acts in that they permitted the various States to adopt fair trade laws and exempted certain contracts or agreements made pursuant to State law from the Sherman Act and Federal Trade Commission Act. The phrase "*any* statute, law, or public policy *now or hereafter in effect*" explodes Hudson's theory that Congress had a particular kind of statute in mind.

The McGuire Act, paragraph 3, makes the matter even more certain with the words "in substance provides". There

could be no clearer demonstration that Congress passed the McGuire Act to permit the States "to experiment further with fair-trade legislation", as the House Committee said (H.R. Rep. No. 1437, 82d Cong., 2d Sess. p. 5 (1952)). Congress intended to make it abundantly clear that in order to effect the public policy of many States "the exercise or enforcement of the right or rights of action created under State law against a person not a signatory to a resale price maintenance contract" was exempted from Federal antitrust law. See H.R. Rep. No. 1516 on H.R. 6925, 82d Cong., 2d Sess. at 17 (1952). Very clearly, paragraph 3 is a license to the States to enact fair trade legislation, if they wish, which binds both those who sign contracts and those who do not, whether the latter are deemed under State law as non-signers or parties to an implied contract.

In arguing that the Ohio Act is not "of a kind" envisaged by Congress, Hudson cites neither the language of the codified statute nor the introductory portion of the statute as passed, both of which are unambiguous, nor the reports of the Congressional committees, which negative the argument. Instead, without showing any need for an examination of legislative history, Hudson looks to (i) inconclusive statements in the floor debates (Brief pp. 44-45) and (ii) elaborate discussion of Congressional activity *subsequent to* the enactment of the McGuire Act, which is clearly irrelevant. An unsuccessful subsequent attempt to broaden fair trade legislation is not a part of the "legislative history" of the McGuire Act, whether or not bills are reported out or hearings held. See *United States* v. *Philadelphia Nat'l Bank*, 374 U. S. 321, 348-49 (1963); *Wong Yang Sung* v. *McGrath*, 339 U. S. 33, 47-48 (1950); *Order of Ry. Conductors* v. *Swan*, 329 U. S. 520, 529 (1947).

F.T.C. v. *Travelers Health Ass'n*, 362 U. S. 293 (1960) (Brief pp. 30, 49) does not justify Hudson's treatment of fair trade legislation. In that case the Court was called on to construe §2(b) of the McCarran-Ferguson Act, 59 Stat. 33, as amended, 61 Stat. 448, 15 U.S.C. §§1011-15 (1958) and particularly the phrase "regulated by State law". Both the majority and dissenting opinions analyzed the statutory language and legislative history of that act. The *result* in that case is irrelevant here since completely different Federal statutes are involved. The *problem* is the same in that this Court must seek the basic purpose of Congress in enacting the McGuire Act. Measured by that purpose, the actions by Upjohn in establishing a price maintenance program as authorized by Ohio and seeking to bind Hudson are clearly within the basic Congressional intent.

In the last analysis, however, even were Hudson right that Congress intended to prohibit a statute establishing prices by "notice alone", there has been no determination by the Ohio Supreme Court that the Ohio Act is such a statute. The Ohio Act does not necessarily authorize establishment by notice alone. Section 1333.29(A) just as easily can be read to require the *establishment* of prices by contract first, and then "control by notice to distributors or by contract". Section 1333.32(A), which makes it unlawful for a distributor "with notice that a distributor *has established* a stipulated minimum resale price" to sell below that price, is as consistent with the first interpretation as with the second. Similarly, the definition of an agreement in §1333.28(I) uses the same phrase.

The statute is in any event open to the construction that it requires signed contracts and then notice of these signed contracts in a situation involving interstate commerce. Indeed, the opinion of the Ohio Supreme Court in this case is not inconsistent with this interpretation. Upon the facts

of this case, and in light of the language of the court below, Hudson cannot require this Court to construe State law in a way which might, in the view of the State court, be in violation of Federal law.

Upjohn has fully complied with the Ohio Act. The provisions of the Ohio Act relied on by Upjohn fully comply with the McGuire Act.

D. The Ohio Fair Trade Act, as Applied to Hudson, Does Not Violate Substantive Due Process (Hudson's Question 2).

Almost thirty years ago this Court held in companion cases that State fair trade laws, including conventional non-signer provisions, did not violate either the due process clause or the equal protection clause of the Fourteenth Amendment. *Old Dearborn Dist. Co.* v. *Seagram-Distillers Corp.*, 299 U. S. 183 (1936); *Pep Boys, Manny, Moe & Jack of California, Inc.* v. *Pyroil Sales Co.*, 299 U. S. 198 (1936). Recent cases of this Court have made it emphatically clear that the day has long passed when the economic wisdom of State statutes presents a substantial Federal question under the Fourteenth Amendment. As this Court recently stated in *Ferguson* v. *Skrupa*, 372 U. S. 726, 730-31 (1963):

> "The doctrine that prevailed in *Lochner, Coppage, Adkins, Burns,* and like cases—that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely—has long since been discarded. We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws. As this Court stated in a unanimous opinion in 1941, 'We are not concerned . . . with the wisdom, need, or appropriateness of the legislation.'

> [citation omitted] Legislative bodies have broad scope to experiment with economic problems, and this Court does not sit to 'subject the State to an intolerable supervision hostile to the basic principles of our Government and wholly beyond the protection which the general clause of the Fourteenth Amendment was intended to secure.' [citation omitted] It is now settled that States 'have power to legislate against what are found to be injurious practices in their internal commercial and business affairs, so long as their laws do not run afoul of some specific federal constitutional prohibition, or of some valid federal law.' [citation omitted]"

It is for this reason that we forbear to argue the merits of State fair trade legislation as was done in the *Old Dearborn* case. The record here abundantly illustrates (R. 161-366) the economic factors involving the encouragement of small business and the protection of property in trade-mark form which caused the Ohio legislature to enact the Ohio Act. This enactment has now been sustained by the Ohio Supreme Court. On the state of the record and the established decisional and statutory basis for Ohio's action, we deem it superfluous to burden the Court in this brief with a detailed presentation of the policy involved, particularly in view of the full development of this point in the two amicus briefs in support of Upjohn in this case and Lilly in No. 490. Suffice it to say that the action by the Ohio legislature falls squarely within the power which the States have "to legislate against what are found to be injurious practices in their internal commercial and business affairs, so long as their laws do not run afoul of some specific federal constitutional prohibition, or of some valid federal law." *Lincoln Federal Labor Union* v. *Northwestern Iron & Metal Co.,* 335 U. S. 525, 536 (1949).

E. Whether a State Statute as a Whole is Void Because of an Unconstitutional Portion is Not a Federal Question (Hudson's Question 3).

Hudson's Jurisdictional Statement requested this Court to strike down the Ohio Act as a whole because "federally unconstitutional provisions" are so commingled with the rest of the statute to make the entire Ohio Act void under the Federal Constitution. This purported Federal issue is listed as a question presented, but is nowhere argued in Hudson's brief and apparently has been abandoned.

This question, in any event, could not have rested on its own. Further, whether a void or unenforceable section of a statute is severable or not is a question of legislative intent. Since the intent involved here is the intent of the Ohio legislature, severability of a provision in the Ohio Act is purely a question of Ohio law. See *Dorchy* v. *Kansas*, 264 U. S. 286, 289-91 (1924).

Conclusion

For the reasons stated, this appeal should be dismissed for lack of jurisdiction in this Court on the present record. If jurisdiction is retained, the judgment of the Ohio Supreme Court should be affirmed.

Respectfully submitted,

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April 8 1964

APPENDIX

Federal Statutes:

1. Jurisdiction and Venue—Supreme Court (28 U.S.C. §1257)

§1257. State courts; appeals; certiorari.

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

2. The McGuire Act (66 Stat. 631-32)

An Act

To amend the Federal Trade Commission Act with respect to certain contracts and agreements which establish minimum or stipulated resale prices and which are extended by State law to persons who are not parties to such contracts and agreements, and for certain other purposes.

Appendix

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That it is the purpose of this Act to protect the rights of States under the United States Constitution to regulate their internal affairs and more particularly to enact statutes and laws, and to adopt policies, which authorize contracts and agreements prescribing minimum or stipulated prices for the resale of commodities and to extend the minimum or stipulated prices prescribed by such contracts and agreements to persons who are not parties thereto. It is the further purpose of this Act to permit such statutes, laws, and public policies to apply to commodities, contracts, agreements, and activities in or affecting interstate or foreign commerce.

Sec. 2. Section 5 (a) of the Federal Trade Commission Act, as amended, is hereby amended to read as follows:

> "Sec. 5. (a) (1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.
>
> "(2) Nothing contained in this Act or in any of the Antitrust Acts shall render unlawful any contracts or agreements prescribing minimum or stipulated prices, or requiring a vendee to enter into contracts or agreements prescribing minimum or stipulated prices, for the resale of a commodity which bears, or the label or container of which bears, the trade-mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions under any statute, law, or public policy

now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale.

"(3) Nothing contained in this Act or in any of the Antitrust Acts shall render unlawful the exercise or the enforcement of any right or right of action created by any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia, which in substance provides that willfully and knowingly advertising, offering for sale, or selling any commodity at less than the price or prices prescribed in such contracts or agreements whether the person so advertising, offering for sale, or selling is or is not a party to such a contract or agreement, is unfair competition and is actionable at the suit of any person damaged thereby.

"(4) Neither the making of contracts or agreements as described in paragraph (2) of this subsection, nor the exercise or enforcement of any right or right of action as described in paragraph (3) of this subsection shall constitute an unlawful burden or restraint upon, or interference with, commerce.

"(5) Nothing contained in paragraph (2) of this subsection shall make lawful contracts or agreements providing for the establishment or maintenance of minimum or stipulated resale prices on any commodity referred to in paragraph (2) of this subsection, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other.

"(6) The Commission is hereby empowered and directed to prevent persons, partnerships, or corpo-

rations, except banks, common carriers subject to the Acts to regulate commerce, air carriers and foreign air carriers subject to the Civil Aeronautics Act of 1938, and persons, partnerships, or corporations subject to the Packers and Stockyards Act, 1921, except as provided in section 406 (b) of said Act, from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce."

Approved July 14, 1952.

State Statute:

Ohio Fair Trade Act of 1959 (selected sections)

§1333.28 Definitions.

As used in sections 1333.27 to 1333.34, inclusive, of the Revised Code:

* * *

(E) "Distributor" means any person who acquires a commodity for the purpose of resale.

* * *

(I) "Contract" means any agreement, written **or verbal, or arising from the acts of the parties. The establishment by a proprietor of a minimum resale price for any commodity pursuant to the provisions of section 1333.29 of the Revised Code and the proprietor's permission for a distributor to acquire and use the proprietor's interest in the trade-mark or trade name in reselling the commodity shall constitute a contract and sufficient consideration from the proprietor for a promise by the distributor not to sell such commodity at less than the minimum price established by the proprietor. Any distributor (whether he acquires such**

commodity directly from the proprietor or otherwise) who, with notice that the proprietor has established a minimum resale price for a commodity, accepts such commodity shall thereby have entered into an agreement with such proprietor not to resell such commodity at less than the minimum price stipulated therefor by such proprietor.

* * *

(K) "Proprietor" means:

(1) A person who identifies a commodity produced by him by the use of his trade-mark or trade name, unless he has specifically granted to another person sole authority to establish minimum resale prices for such commodity;

(2) A person who identifies a commodity distributed by him by the use of his own trade-mark or trade name;

(3) A person who has been specifically granted by the producer or distributor of a commodity which is identified by the trade-mark or trade name of such producer or distributor the sole authority to establish minimum resale prices for such commodity in the state.

§1333.29 Contracts or notices establishing minimum resale prices.

(A) It shall be lawful, anything in sections 1331.01 to 1331.14 of the Revised Code or otherwise provided in the Revised Code to the contrary notwithstanding, for a proprietor to establish and control by notice to distributors or by contract, stipulated minimum resale prices for a commodity of which he is the proprietor and which is in free and open competition with commodities of

the same general class produced by others and offered for sale in the same general market area. Such minimum resale prices may be differentiated as to various levels of distribution, provided such differentiations are not otherwise unlawfully discriminatory. Such prices may be changed from time to time by written notice to distributors who acquired such commodity with notice of any established minimum resale price. A proprietor may so establish such minimum resale prices for his wholesale distributors, notwithstanding section 1333.34 of the Revised Code, even though he sells such commodity to retailers in competition with such wholesale distributors, if such sales to retailers are made at prices not less than those he establishes for such wholesale distributors for comparable sales.

(B) Any such contract or notice may contain the following provisions:

(1) That the buyer will not resell such commodity at less than the minimum resale price stipulated by the proprietor thereof for the level of distribution at which the buyer resells the same;

(2) That the buyer will require from any distributor to whom he may resell such commodity an agreement that such distributor will not, in turn, resell such commodity at less than the minimum resale price stipulated by the proprietor thereof for the level of distribution at which such distributor resells and that such distributor, if he resells to another distributor, will make the same agreement with the distributor to whom he may resell;

(3) That the seller will require from any other distributor to whom he may sell other items of such commodity an agreement that such distributor will not, in turn, resell such commodity at less than the

minimum resale price stipulated by the proprietor for the level of distribution at which such distributor resells and that such distributor, if he resells to another distributor, will make the same agreement with the distributor to whom he may resell.

(C) Any contract or notice authorized by and entered into pursuant to any of the provisions of sections 1333.27 to 1333.34, inclusive, of the Revised Code, shall be for the benefit of the proprietor and any distributor who is bound by a similar contract or notice.

§1333.32 Unfair competition; remedies.

(A) Except as provided in section 1333.33 of the Revised Code, it shall be unlawful and an act of unfair competition for any distributor with notice that a proprietor has established a stipulated minimum resale price for a commodity of which he is the proprietor or for any distributor who is in contract with a proprietor not to sell a commodity for which such proprietor has established a stipulated minimum resale price at less than such stipulated minimum resale price, to sell, offer to sell, or advertise such a commodity for sale at a price lower than such stipulated minimum resale price. In determining whether the sale or offer to sell or advertisement for sale of any commodity is below the stipulated minimum resale price established by the proprietor for such commodity there shall be deducted from the price at which such commodity is sold, offered for sale, or advertised for sale the value of any article or thing of exchange or extrinsic value or any concession made, whether by the giving of coupons or otherwise, which is given or to be given in connection with such sale or offering to sell and

the sale or offering for sale of such commodity with any other commodity for a single or combined price, or the giving of or offering to give any credit or allowance in excess of the actual market value thereof, or the failure to add any tax occasioned by or upon the sale of such commodity shall also be taken into consideration in determining whether such sale, offer to sell, or advertisement for sale is below the minimum resale price stipulated for such commodity by the proprietor, provided the allowance by a distributor to his customers of trading stamps or other redeemable certificates, when the amount or value of such allowance does not exceed three per cent of such stipulated minimum resale price, where the posted or advertised price of any commodity or commodities is not less than the stipulated minimum resale price thereof, shall not constitute the offering or making of a gift or concession prohibited by this section nor a violation of any of the provisions of sections 1333.27 to 1333.34, inclusive, of the Revised Code.

(B) Any person suffering or reasonably anticipating damage by reason of a violation of this section may bring suit in any court of competent jurisdiction in the state to:

(1) Recover the amount of damages sustained as a result thereof;

(2) Obtain injunctive relief whether or not specific monetary damages are established;

(3) Recover the costs of suit, including reasonable attorney fees, which costs and attorney fees may be recovered whether or not specific monetary damages are established;

(C) It shall be no defense to a prayer for an injunction in any such action that there is an adequate remedy at law.

§1333.34 Exempt agreements.

Sections 1333.27 to 1333.34, inclusive, of the Revised Code, shall not, except as otherwise specifically provided in section 1333.29 of the Revised Code, apply to any contract, agreement, or understanding between or among producers, or between or among distributors, or between or among wholesalers.

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In the Supreme Court of the United States

OCTOBER TERM, 1963.

No. 489.

HUDSON DISTRIBUTORS, INC.,
Appellant,

vs.

THE UPJOHN COMPANY,
Appellee.

No. 490.

HUDSON DISTRIBUTORS, INC.,
Appellant,

v.

ELI LILLY AND COMPANY,
Appellee.

ON APPEAL FROM
THE SUPREME COURT OF THE STATE OF OHIO.

REPLY BRIEF OF APPELLANT.

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I. PRELIMINARY STATEMENT.

With one important exception, the Briefs of Appellees, The Upjohn Company ("Upjohn") and Eli Lilly and Company ("Lilly") present a similar approach to the problems in these appeals. Upjohn goes to considerable lengths to show a "stipulation" whereby all Federal issues were removed from the case in the courts below. Lilly was not aware of any such "stipulation." In Lilly's view, "the

non-constitutional issues were reserved by stipulation for subsequent adjudication." (Lilly Brief, at 9.)

Both Briefs seek to avoid a ruling by this Court on issues of national importance—the proper scope of the exemptions from antitrust afforded by the Miller-Tydings and McGuire Acts; and whether the Ohio Statute (O. R. C. 1333.27 through 1333.34, inclusive), is outside the scope of Congressional intention under these exemptions where a state has eliminated a "nonsigner" clause. Appellees seek to avoid such ruling both upon substantive and procedural grounds.

A. Avoidance of ruling upon substantive grounds.

The avoidance of ruling upon substantive grounds is sought by wholly ignoring the origin and history of the Ohio Statute. Appellant has shown that the Ohio Statute was based upon proposed Congressional legislation of 1958 which, in revolt against the "contracts and agreements" methods of McGuire, would "organize the market" at fair trade levels for wholesale and retail distribution of goods in interstate commerce. The new "organizing" was to be based upon a notice of a "proprietor's" retained "proprietary interest" in trademarks and trade names. Under the protective umbrella of this congressional legislation, "diverting" of fair trade goods to "discounters" would be halted and fair trade "cooperatively enforced"—a cooperative program presently illegal under the Sherman Act. The *McKesson and Robbins* doctrine would be uprooted.

Moreover, Appellees wholly ignore the two hundred pages of the Record presenting the legislative history within the State of Ohio (R. 161-366)—a history which Upjohn added to the Record in the Courts below. This Ohio legislative history shows how the MacLachlan and Harris proposed national legislation of 1958—even to statements

of policy—was adopted in Ohio. No attempt was made to reconcile this Ohio legislation with the Federal enabling legislation. The only change made in Ohio from the proposed congressional legislation was the addition of a few "notice contract" provisions from the 1958 Virginia "fair trade" legislation.

So basic and radical a shift in interstate market structure and theory may be enacted solely by the Congress. Appellees wholly ignore the enactment by the Ohio Legisture of this "illegal system of distribution" in commerce, with an added "patch" of "notice contracts" in token compliance with the exemptions for fair trade legislation contained in the Miller-Tydings and McGuire Acts.

B. Avoidance of ruling upon procedural grounds.

Appellees also seek to avoid any ruling by this Court upon jurisdictional grounds. The first such ground is that "the judgment below (and in the *Lilly* case, No. 490) does not have the requisite finality." (Upjohn Brief at 1; Lilly Brief at 1-2.)

The second jurisdictional contention is made that the five Federal questions presented were not "actually or necessarily decided by the Ohio Supreme Court." (Upjohn Brief at 14; Lilly Brief at 12-14.)

Neither of these procedural contentions is tenable. Upjohn's principal basis for the procedural contentions rests upon a "stipulation" which is discussed and relied upon through much of Upjohn's Brief (e.g., pp. 2, 3, 6, 9-10, 11, 12, 13, 14, 22, 25, 27-32). By this "stipulation," Upjohn contends all Federal questions were reserved for trial upon Upjohn's Counterclaim and Hudson's Reply. Lilly concedes that only "non-constitutional issues were reserved by stipulation for subsequent adjudication." (Lilly Brief, at 9.)

Since Upjohn's "stipulation" issue is pervasive, appellant will first discuss it.

II. THE ALLEGED STIPULATION.

A. The parties below did not stipulate for the reservation of the Federal issues for later trial upon Upjohn's Cross-Petition and Hudson's Answer thereto, and Appellees joined in Hudson's motion to certify to the Supreme Court of Ohio on broad Federal and State issues.

Upjohn's basis for asserting that there was an agreement for the reservation of the Federal issues appears at page 9 of its Brief:

> "Before the oral argument on the motion for summary judgment which was heard on May 5, 1960, counsel for both parties stipulated in open court that only the constitutional issues raised in Hudson's Petition and Upjohn's answer would be heard by the court, and the issues raised by Upjohn's Cross-Petition for injunction and Hudson's Amended Answer thereto (*McKesson & Robbins* and waiver) would be reserved for future determination. This stipulation eliminated the issues on which factual disputes were presented and enabled the court to proceed without trial on the basic legal issue of the validity of the Ohio Act *under the Ohio Constitution*." (Italics added.)

Upjohn's limitation of the stipulation to "the validity of the Onio Act *under the Ohio Constitution*" is wholly unwarranted. No such limitation appears in Upjohn's quotations from Hudson's Briefs. Hudson stated that by stipulation, "the litigation was * * * narrowed to the basic issue of the constitutionality of the new Fair Trade Law." Upjohn has seen fit to add the qualifying phrase "under the Ohio Constitution."

Neither the courts below nor Upjohn understood that the litigation was confined by any such "stipulation" as is

now for the first time urged upon this Court. Rather what was comprehended was a severance of the Petition and Answer and Reply from the Cross-Petition and Amended Answer thereto, in accordance with Ohio practice, *so that all issues of constitutionality might be first determined by appellant's declaratory judgment action.*

The interpretation Upjohn now for the first time seeks to give the stipulation cannot be reconciled with its position in the Courts below. When Appellant filed its Petition for Rehearing in the Court of Appeals (R. 409-410) and suggested that the Court may not have considered the Federal issues including the *McKesson* issue, Upjohn's Brief as Defendant-Appellant in Opposition to Petition for Rehearing* contended that Hudson's position "borders on the ludicrous" (Appendix A, *infra*, p. 54).

Upjohn also joined in Hudson's Motion to Certify this case to the Ohio Supreme Court on broad assignments of error of unconstitutionality both under the Ohio Constitution and the Federal Constitution and statutes. The Answer of The Upjohn Company to Brief in Support of Motion to Certify Record* noted specifically that Hudson's assignments of error included Federal issues (Appendix A, *infra*, p. 57). Moreover, Hudson's Brief in Support of Motion to Certify Record included a statement of the Federal issues. (Appendix A, *infra*, pp. 56-57, and Appendix C, *infra*, pp. 73-74.)

B. The Federal issues were not abandoned by any joint consideration of issues in the Upjohn (No. 489) and Lilly (No. 490) cases limited to the Ohio Constitution.

In this Court, Upjohn also argues (pp. 11-12) for the first time an abandonment by Hudson of Federal issues since the *Upjohn* case (No. 489) and the *Lilly* case (No.

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* A certified copy of this Brief has been deposited by Hudson with the Clerk of this Court.

490) were jointly considered "in each of the Courts below" on the limited "common issue" of constitutionality of the Ohio Act *"under the Ohio Constitution."*

This contention is directly contrary to the understanding of Lilly's Ohio counsel. In the summer of 1963, Lilly's Ohio Counsel took the position in litigation upon the Cross-Petition in Case No. 490 that all Federal issues concerning its fair trade contract and its practices thereunder had been resolved by the Supreme Court of Ohio (Appendix B, *infra*, pp. 63-64).

In arguing for the existence of a "stipulation" removing Federal issues from consideration by the Courts below, Upjohn is gravely in error. This error stems, it is suggested, from the possible unfamiliarity of Upjohn counsel in this Court with all the proceedings of other counsel in the courts below, and the fact that the acts and conduct which create the basic conflict between the Ohio Statute and the Supremacy Clause of the Constitution also relate to Upjohn's standing in equity to enforce its Cross-Petition.

C. Ohio appellate practice requires its Appellate Courts to decide all issues raised by assignment of error and by Brief.

In contending that the Ohio Courts did not "actually or necessarily" decide all or any of the Federal questions (Upjohn Brief, 14-15, 25-32; Lilly Brief, 12-14, 22-33), Appellees fail to take into account the requirements of Section 2505.21, O. R. C. which commands:

> *"Appeals taken on questions of law shall be heard upon assignments of error filed in the cause or set out in the briefs of the appellant before hearing.* Errors not specifically pointed out in the record and separately argued by brief may be disregarded, but *the court*

may consider and decide errors which are not assigned or specified. Failure to file such briefs and assignments of error within the time prescribed by the court rules is cause for dismissal of such appeal. *All errors assigned and briefed shall be passed upon* (by) *the court.* * * *" (Italics added.)

This statute is deemed to be binding both upon the Supreme Court of Ohio and all lower appellate courts.

The liberal Ohio appellate practice on the scope of issues before a reviewing court is further enhanced by the rule that assignments of error are not required to be labeled so long as they are clearly set forth by brief. *Neale v. Board of Liquor Control,* 80 O. L. Abs. 587, 160 N. E. (2nd) 352 (Ct. App. Franklin Cty., 1959). Errors will be deemed to be abandoned and disregarded by a reviewing court only when they are not mentioned or discussed in appellant's brief. *Riss & Co. v. Bowers,* 114 Ohio App. 429, 183 N. E. (2nd) 786 (Ct. App. Franklin Cty., 1961).

The Ohio Courts on appeal are also free to rule upon any error disclosed by the record whether or not specifically directed to the attention of the Court by brief or otherwise. *In re Ramsey,* 164 Ohio St. 567, 132 N. E. 2d 469 (1956).

The importance of the brief in Ohio appellate practice is reflected in the Rules of the Supreme Court of Ohio, which require that assignments of error be specified by brief both in support of the motion to certify to the Supreme Court and in the brief on the merits. (Rules of the Supreme Court of Ohio, Rule II, Section 2(A)(a); Rule VIII, Section 3(a).)

When Appellees joined in Hudson's motion to certify to the Supreme Court of Ohio upon the grounds set forth in Hudson's Brief in Support of Motion to Certify, their counsel did so in the light of the established Ohio rules that:

(a) appealable orders must be "final." O. R. C. Sections 2505.03, 2505.28. *Cincinnati v. Gormany*, 96 Ohio St. 596, 118 N. E. 1082 (1917); and *Bradford v. Micklethwaite*, 163 Ohio St. 301, 127 N. E. 2d 21 (1955) (concurring opinion).

(b) issues may not be raised on appeal which were not raised in the courts below. *In re Bowen*, 141 Ohio St. 602, 49 N. E. 2d 753 (1943); 3 *Ohio Jur.* 2d, Appellate Review, § 185 at p. 38.

Because of the importance of briefs in Ohio appellate procedure, when Hudson filed its Notice of Appeal in the Supreme Court of Ohio (R. 426-427) and requested the "transmission to the clerk of the Supreme Court of the United States * * * of all pleadings, original papers, testimony and evidence offered, heard, and taken into consideration in rendering the judgment aforesaid," the Clerk of the Supreme Court of Ohio sent to the Clerk of the Supreme Court of the United States every document, *including briefs*, filed by Hudson, Upjohn and Lilly in the Ohio Supreme Court, except the briefs of Appellees whereby they joined in Hudson's motion to certify. As previously noted, Hudson has lodged with this Court certified copies of Appellees' briefs joining in the motion to certify.

D. The record in this Court affirmatively discloses that there was duly drawn in question the validity of the Ohio Fair Trade Act because of repugnance to the Constitution and laws of the United States.

By reason of the foregoing course of appeal in the Ohio courts and the lodging in this court by the Supreme Court of Ohio of the briefs, motions and documents filed therein, with the exception of the briefs joining in Hudson's Motion to Certify, Upjohn's reliance upon *Live Oak*

Water Users' Ass'n. v. Railroad Commission, 269 U. S. 354 (1926), at page 25 of its Brief, is misplaced. By contrast with the *Live Oak* case, in the case at bar, briefs *were* part of the record filed with this Court.

Moreover, from the record in this Court, its jurisdiction is established by the test enunciated in *Live Oak* since "it affirmatively appears that in the court below there was duly drawn in question the validity of a statute of or an authority exercised under the state, because of repugnance to the Constitution, treaties or laws of the United States." (269 U. S. at 356.)

This Court's jurisdiction plainly appears from the Briefs and contentions of the parties in all the courts below and from the Opinions of the Court of Common Pleas and Court of Appeals. The opinion of the Court of Common Pleas (R. 371-380) makes specific reference to both Appellees' contention in that Court that the Federal Constitution and laws do not affect the validity of the Ohio Fair Trade Act. (R. 375.)

Both the Opinion and the Judgment of the Court of Appeals are replete with references to the Federal issues which were briefed and argued by the parties. (R. 380-406; 411-412.)

The ruling of the minority of the Judges in the Supreme Court of Ohio could not have been arrived at without overruling Hudson's arguments addressed to the Federal Constitution and statutes. Otherwise this ruling would have been in disregard of the specific requirements of Section 2505.21, O. R. C., *supra*, pp. 6-7.

Appellant has prepared an Appendix A referable to Upjohn, and an Appendix C, referable to Lilly (*infra*, pp. 42 to 80) drawn from the pleadings of record and the briefs of the parties in the Court of Common Pleas and in the Court of Appeals showing that each Federal question

was preserved in all Ohio Courts within the intendment and requirements of Ohio appellate procedure. Certified copies of such briefs have been deposited with the Clerk of this Court.

III. IN CONTENDING THAT THE JUDGMENT BELOW WAS NOT "FINAL," UPJOHN RELIES UPON THE "STIPULATION," BOTH APPELLEES OVERLOOK THE OHIO STATUTE WHEREBY A COUNTERCLAIM IS WHOLLY INDEPENDENT FROM THE CAUSE OF ACTION IN A PETITION, AND DISREGARD THE IMPLICATIONS OF THE DECLARATORY JUDGMENT ACTION.

Upjohn's second procedural contention concerns the finality of the judgment below. Upjohn's argument here, too, proceeds upon the theory that by "stipulation" (Upjohn Brief, 22, n. 12 at 24) the parties reserved the Federal issues for later adjudication.

With the removal from the case of any theory that the Federal issues were reserved for future determination, the contentions of both Appellees concerning the lack of finality of the judgment in the court below may be appraised in the light of the practice in Ohio with reference to cross-petitions or counter-claims.

There would appear to be little material difference between these terms in the Ohio Courts. Lowry, *Counter Claims or Cross Petitions in Ohio Practice*, 19 Cin. L. Rev. 316 (1950). Ohio has no mandatory counter claim practice. In *Horne v. Woolever*, 170 Ohio St. 178, 163 N. E. 2d 378 (1959), the Court noted the difference between the Ohio practice and that in other jurisdictions:

> "Where Rule 13 of the Federal Rules of Civil Procedure or a similar applicable rule or statute requires a defendant to assert a claim that such defendant has as a counterclaim in an action, such rule or statute has the effect of making such action an action based upon not only the cause of action asserted in the pe-

tition but also the cause of action that should have been asserted by way of counterclaim." (170 Ohio St. at 181.)

The Court then noted that in Ohio there is no requirement for compulsory counterclaims comparable with that provided for by Rule 13, F. R. C. P. On the contrary, Section 2309.35, O. R. C. provides:

> "At any time *before the final submission of a cause*, on motion of the defendant, the court may allow a counterclaim to be withdrawn, and it may become the subject of another action. On motion of either party, to be made at the time such counterclaim is withdrawn, an action on it shall be docketed and proceeded in without process. The court shall direct the time and manner of pleading therein. If any action is not so docketed, suit may be brought as in other cases." (Italics added.)

While the determination of "finality" is the province of this Court, it is submitted that the Ohio practice is persuasive in outlining the perimeter of the litigation below. Stern and Gressman, *Supreme Court Practice* (3rd Ed., 1962) 75 to 76.

When Judge McNeill in the Court of Common Pleas suggested to the parties that they proceed solely upon the petition for declaratory judgment and the answer thereto, the parties understood and acted upon his suggestion in the light of established Ohio practice—namely, that the law suits presented by the petitions and responsive pleadings on the one hand, and by the cross-petitions and the answers thereto on the other, were separate and severable. If indeed this were not the case, an appealable "final order" under Ohio appellate practice could not have resulted.

Not once prior to the filing of the respective Briefs for the Appellees in this Court has any suggestion been made

by any counsel for Upjohn that the Federal issues presented upon this or any prior appeal were precluded by lack of finality.* It would, therefore, seem clear that both by the Ohio practice and the stipulation before the trial judge, the respective orders appealed from achieved "finality."

Appellees also do not relate the issue of finality to the purpose of the declaratory judgment statutes. The within actions are declaratory judgment actions. The purpose of the Uniform Declaratory Judgments Act (O. R. C., Sections 2721.01-2721.15) would be disserved by this Court's acceding to Upjohn's argument that there will not be "any irreparable harm to Hudson if the Court dismisses the appeal and determines that the raising of any Federal question now is premature." (Upjohn Brief, p. 23.) Hudson might well be put out of business by injunction before the constitutional issues were finally determined on the cross-petition.

It is the purpose of the declaratory judgment action to assist parties to determine their rights as expeditiously as possible. The difficulty with the issue of constitutionality in the Ohio courts is evident not only from the conflicting results below, but from the judgment in the cases at bar by a minority of the Judges in the Supreme Court of Ohio.** It is, therefore, urged that the policy of

* In the Supreme Court of Ohio, for example, the Upjohn Brief, at pages 65 to 69, discussed the relationship of Federal issues to the constitutionality of the Ohio Fair Trade Law under the heading:

> "G. Acts of Congress and their interpretation by Federal Courts have no bearing upon the constitutionality of the Ohio Fair Trade Act."

The Lilly Brief in the Ohio Supreme Court also argued the Federal issues at pages 57 to 60.

** Of the sixteen Judges in the Ohio courts who have ruled upon the constitutionality of the 1959 Fair Trade Act, five have sustained it.

the declaratory judgment procedure, both state and federal, be furthered by this Court's continued giving to such judgments the status of finality. *Nashville C. & St. L. Ry. v. Wallace*, 288 U. S. 249 (1933); Baskey, *Finality of State Court Judgments under the Federal Judicial Code*, 43 Col. L. Rev. 1002, 1014, n. 48 (1943).

IV. IT IS THE PROVINCE OF THE FEDERAL COURTS TO DETERMINE WHETHER STATE LEGISLATION PURSUANT TO A FEDERAL ENABLING ACT HAS CREATED AN ANTITRUST EXEMPTION FOR AN OTHERWISE ILLEGAL PRICE FIXING ARRANGEMENT WITH WHICH APPELLEES DEMAND APPELLANT CONFORM.

Upjohn takes the position that none of the questions presented raises "a real issue" with respect to the Federal law or Federal Constitution (Upjohn Brief, pages 16 to 19; pages 33 to 52). The Lilly Brief (14-18; 33-68) charges that Hudson "specifically challenges only a few provisions of the Ohio Act, none of which are applicable to the facts of this case."

The premise for these contentions lies in an unwarranted narrowing and limitation of the legal issues before this Court. Appellees' premise is that a *further construction* of the Ohio statute by the Ohio Supreme Court is required to resolve any ambiguities of interpretation (Upjohn Brief, 16, 33; Lilly Brief, 28, 36).

Appellees overlook the fact that the Ohio Supreme Court *has passed upon and overruled* all Federal constitutional objections. Upjohn would also have this Court disregard the fact that in a State where a nonsigner clause is wholly ineffective, a new fair trade act drawn upon the theory of the ineffectiveness of the nonsigner clause is now sought to be made effective against a nonsigner. Upjohn would have this Court disregard the source and kind of

statute by which this result is sought to be achieved following the overruling by the State Supreme Court of all Federal constitutional objections.

A. Appellees' premise for ascertaining the validity of the Ohio Fair Trade Law denies to the Federal Courts the construction of federal exemptions from antitrust.

Appellees' requirement of *additional construction* of the Act by the Ohio Supreme Court cannot be reconciled with the consistent holdings of this Court that:

(a) Upon the assertion of antitrust illegality by the Department of Justice, administrative agency, or aggrieved private party, the scope of an alleged exemption from antitrust is a Federal issue, for construction by the Federal courts;

(b) It is the province of the Federal courts to determine whether state legislation or marketing arrangements pursuant thereto are within the legislative or marketing arrangements envisaged by the Federal enabling provisions for the claimed exemptions from the operation of the Anti-Trust laws.

1. Fair Trade Legislation and Marketing Practice.

In *Schwegmann Brothers vs. Calvert Distillers Corp.*, 341 U. S. 384 (1951), this Court noted the "critical differences" between Louisiana's law and the Miller-Tydings Act. The Court construed the scope of the exemption as "a limited immunity," and compared the enabling legislation with the Louisiana statute (341 U. S., at 387, 388).

When the Louisiana statute, thus appraised, was found wanting, the enforcement of the "marketing arrangement" thereunder was refused, since "this interstate marketing arrangement would be illegal, would be

enjoined, that it would draw civil and criminal penalties, and that no court would enforce it," (341 U. S., at 386).

The technique for comparing statute and marketing practice was further refined by *United States v. McKesson & Robbins, Inc.,* 351 U. S. 305 (1956), where this Court clarified the import and purpose of Section 5 (a) (5) of the McGuire Act and the strict construction required of price fixing enabling legislation.

2. Liquor Control by the States.

In *United States vs. Frankfort Distilleries, Inc.,* 324 U. S. 293 (1945), the principal issue before this Court was "whether the state's power to control the liquor traffic within its boundaries makes the Sherman Act inapplicable" (324 U. S. at 297). Although the majority opinion found that the Twenty-first Amendment to the Constitution "bestowed upon the state broad regulatory power over the liquor traffic within their territories," it did not give the states "plenary and exclusive" power to regulate the conduct of persons doing an interstate liquor business outside Colorado. (324 U. S. at 299.) The Court held that the Sherman Act "is not being enforced in this case in such a manner as to conflict with the law of Colorado" (324 U. S. at 664).

The concurring opinion saw the question in the case as "whether in fact the policy of Colorado sanctions such an arrangement as the indictment charges." (324 U. S. at 301.) While the concurring opinion further noted that "it is precarious business for an outsider to be confident about the legal policy of a State," neither the majority of this Court nor the concurring Justices suggested that the issue be sent back to the Supreme Court of Colorado for decision of the impact of Colorado statutes on Federal law.

In subsequent litigation putting in issue the relationship between state liquor policy and the federal antitrust laws, the Federal courts have uniformly resolved for themselves the issue of the possible pre-emption of Federal anti-trust statutes by state enactments under the Twenty-first Amendment, and the effect and scope of state policy. *Washington Brewers Institute vs. United States*, 137 F. 2d 964 (C. A. 9, 1943), *cert. den.*, 320 U. S. 776 (1943); *United States vs. Maryland State License Bev. Assn.*, 138 F. Supp. 685 (D. Md., 1956) *rev'd on other grounds*, 240 F. 2d 420 (C. A. 4, 1957); *United States vs. Erie County Malt Beverage Dist. Assn.*, 264 F. 2d 231 (C. A. 3, 1959).

3. The McCarran-Ferguson Act and the Insurance Exemption.

In *F. T. C. vs. Travelers Health Assn.*, 362 U. S. 293 (1960), this Court construed Nebraska insurance regulatory legislation to determine whether the exemption from Federal regulation afforded under the phrase "regulated by State law" in Section 2(b) of the McCarran-Ferguson Act, had been conferred by the Nebraska legislation. The Brief of the Federal Trade Commission (Page 10) states the position resolved in its favor by this Court:

> "Our contention is simply that the state regulation intended to displace existing federal legislation outlawing deceptive practices in interstate commerce channels is regulation by the state where the deception is practiced and has its impact."

Again, this Court did not remand the case for construction of the Nebraska statute by the Nebraska Supreme Court to ascertain the scope of Nebraska's power over "the practices of an insurance business affecting the residents of every other State in the Union," (362 U. S. at 302), nor "the impediments, contingencies and doubts which constitutional limitations might create as to Ne-

braska's power to regulate any given aspect of extra-territorial activity * * *." (Ibid.)

The reasoning of *Travelers* was applied in a rate-fixing investigation under the Sherman Act. *In re Aviation Insurance Industry*, 183 F. Supp. 374 (S. D. N. Y., 1960).

It follows from the foregoing that by invoking the necessity for *further* interpretation by the Ohio Supreme Court, Upjohn is seeking to oust the Federal courts of their normal and customary function in determining whether the Ohio legislation has created a valid exemption for the price fixing arrangements now sought to be enforced.

B. The provisions of the 1959 Ohio Fair Trade Act are on their face wholly outside the permissible scope of the Miller-Tydings and the McGuire Acts in that the Ohio statute creates an unlawful marketing arrangement in commerce with a "patch" of contract-language pricing provisions.

Upjohn joins with Hudson in its appraisal of the basic premise applicable to this case. As Upjohn states:

> "The problem [in *Travelers*] is the same [as in the case at bar] in that this Court must seek the basic purpose of Congress in enacting the McGuire Act." (Page 49.)

The purposes of the Miller-Tydings and McGuire Acts are plain. As *McKesson & Robbins, Inc.* held:

> "We are to take the words of these statutes 'in their normal and customary meaning.'" (351 U. S. 311 to 312.)

State legislation which goes beyond the "normal and customary" scope and construction of the provisions of the Federal enabling legislation creates and seeks to maintain unlawful transactions in commerce in violation of Sec-

tion 1 of the Sherman Act. This is the plain teaching of *Schwegmann* and *McKesson.*

There are "critical differences" between the provisions and purposes of the 1959 Ohio Fair Trade Act and the Federal enabling statutes. In contrast with the few provisions of the 1936 Ohio Fair Trade Law (Sections 1333.05-1333.08) which conform with the few provisions of the McGuire Act, it is plain that the provisions of the 1959 Ohio Act contemplate the "organization of the market" along the lines indicated in Hudson's main Brief.

The statutory purpose expressed in Section 1333.27 (B), taken practically verbatim from 1959 proposed Congressional legislation, is forthright. The Ohio statute seeks the establishment of "fair, equitable and competitive prices * * * in all appropriate stages in the distribution of * * * identified merchandise." The statutory vehicles to achieve this purpose include "horizontal" third party beneficiary contract provisions, permissive price fixing provisions at dual distribution levels in violation of Section 5(a)(5) of the McGuire Act and the *McKesson & Robbins* doctrine; and provisions for the limitation of channels of distribution and marketing practices by sellers, distributors and their subvendees.

1. The McKesson Issue.

Question 1(a) (the *McKesson issue*) bears directly upon the constitutionality of the Ohio Act in that Section 1333.29(A) expressly authorizes what Section 5(a) (5) of the McGuire Act prohibits.

Upjohn appears clearly to have utilized this provision of the Ohio law in its *del credere* marketing arrangement. As page 47 of the Brief for the United States in *United States v. McKesson & Robbins, Inc.*, 351 U. S. 305 (1956),

pointed out, this Court in *United States v. Masonite Corp.*, 316 U. S. 265, 280, note 4 "rather plainly implies that the Miller-Tydings Act * * * would * * * fail to confer immunity upon a price fixing agreement between the " 'principals' and a competing 'agent.' "

The evidence in this case fully discloses the competition between McKesson & Robbins, Inc., the *del credere* agent, and Upjohn in sales to retailers. Appendix A, *infra*, p. 44. Similar *del credere* agency arrangements were in effect with other wholesalers. (R. 88.) Upon its face and on account of the marketing practices condoned, the Ohio Fair Trade Act is unconstitutional. It conflicts with the McGuire Act and Section 1 of the Sherman Act and hence violates the Supremacy Clause.

2. The "horizontal price agreements" and "horizontal boycott" issue.

It is equally clear that Par. 6 of the Lilly Manufacturer-Retailer Fair Trade Contract constitutes, prohibiting sales by a retailer to a price-cutter, a boycott within the intent of this Court's ruling in *Fashion Guild v. Fed. Trade Commission*, 312 U. S. 457 (1941). It is the common understanding of the profession that such clauses in or out of fair trade agreements are unlawful and in violation of Section 1. Barber, *Refusals to Deal Under the Federal Anti-Trust Laws*, 103 U. of P. L. Rev., 847, 856, n. 40; Harper, *Essentials and Embellishments of the Fair Trade Contract*, The Basis and Development of Fair Trade (The National Wholesale Druggists' Association, 3rd Ed., 1955) 97.

There is nothing in the McGuire Act to authorize a provision like Section 1333.29 (B) (2) which, in a different form of words, authorizes the kind of restriction of a buyer embodied in the Lilly contract.

Lilly defends such provisions on the grounds that Par. 6 is merely a "method of insuring a non-discriminatory resale price maintenance program and enforcing observance of the fair trade prices by persons already obliged to observe them." (Lilly Brief, at 38). The enforcement provisions of the "non-signer" clause of McGuire, Section 5(a)(3), are invoked in support of the collective action. A "non-discriminatory enforcement and observance" of the Fair Trade laws is further seen as aiding the Congressional intention in enacting McGuire in 1952 to permit state fair trade laws "to apply in their totality." (*Ibid.*) A retailer complying with the fair trade law is not to be permitted "to aid and abet its violation by others." (Lilly Brief, at 40).

The Lilly brief thus gives full support to the Hudson charge that the aim and objective of the Fair Trade Law of Ohio is to prevent the "diverting" of "fair-traded" merchandise. *The McGuire Act says nothing about such an objective.* When, therefore, Hudson is required by the Lilly notice (Lilly Record, 18) to conduct its operations "in accordance with the obligations under the contracts," and "under the Ohio Fair Trade Act," it is asked to join the boycott.

The few simple vertical price maintenance provisions of Section 5(a)(2) of the McGuire Act scarcely can be found to encompass Lilly's objective. And Lilly's offer to let a retailer "fight his way" out of the unlawful boycotting provision of Paragraph 6 of the Lilly contract (Lilly Brief, footnote, p. 38) is scarcely a satisfactory alternative to a valid exemption from anti-trust. Cf. *F. T. C. v. Travelers' Health Ass'n.*, 362 U. S. 293, 302 (1960).

3. The "notice" issue.

As the discussion of the "notice method" of setting resale prices in the next section shows, by means of a "notice" of a "proprietary interest," the Ohio statute seeks to provide the vehicle for obliterating distinction between a "signer" and a "nonsigner" that has brought on many rulings like *Bargain Fair*. All persons are now "contractors." The "signer" and "nonsigner" provisions of the Federal statutes are sought to be effectively discarded.

Persons like Hudson, who have the right to be free from the "nonsigner" provisions of Section 5(a)(3) of the McGuire Act, because it is against the constitutional law and policy of the State of Ohio to create or enforce fair trade agreements against nonsigners, are now told that they are bound "on contract principles." Brief *Amici Curiae* of *Corning Glass Works, et al.*, at 8.

Appellees make no reference to the two hundred (200) pages of the legislative history of the Ohio statute as it appears in the Record; nor do Appellees discuss the antecedents of the 1959 Ohio Act, such as the various Harris Bills and the MacLachlan proposals.

In fact, Upjohn seeks to discourage such inquiry by arguing that Hudson looks to "elaborate discussion of Congressional activity subsequent to the enactment of the McGuire Act * * * An unsuccessful subsequent attempt to broaden fair trade legislation is not a part of the 'legislative' history of the McGuire Act, whether or not bills are reported out or hearings held." (Upjohn Brief, at 48.) Similar argument made by Lilly. (Lilly Brief, 54-55).

Appellees mistake the purpose of Hudson's inquiry into the congressional fair trade legislation subsequent to the McGuire Act. The purpose of such inquiry is to establish the origins and purpose of the practically identical 1959 Ohio legislation. Such is also the purpose of the com-

parison of the 1959 Ohio legislation with the 1958 Virginia legislation.

The comparison clearly establishes that an unlawful marketing system has been proposed by the Ohio Legislature which is in derogation of, and designed to be substituted for legislation conforming with the McGuire Act. The pricing provisions of the Ohio legislation are a mere "patch" of contract-language upon the "proprietary interest" proposals of the Harris Bill. Where legislation is patently and on its face beyond the limits of Federal exemptions from antitrust, the Federal courts will so declare at the instance of regulatory agencies, the Department of Justice, or private persons adversely affected thereby.

Appellees contend that this Court's ruling must be delayed until the Ohio Supreme Court has definitively interpretcd the statute.

Appellees rely upon cases like *Alabama State Federation of Labor v. McAdory*, 325 U. S. 450 (1945) and *Rescue Army v. Municipal Court*, 331 U. S. 549 (1947). Neither case involves the applicability of Federal law by reason of failure to conform with Federal enabling exemptive legislation. Moreover, the Supreme Court of Ohio has overruled all Federal constitutional objections. Additionally, the Ohio 1959 Fair Trade Act is scarcely of doubtful construction. Its scope and meaning plainly appear on its face. This plain purpose, motivation and construction have been confirmed by the Ohio legislative hearings incorporated in the Record, and by the extensive congressional hearings on the MacLachlan proposal and Harris Bills, and the Committee Report on the Harris Bill.

V. THE "NOTICE CONTRACT" PROVISIONS OF THE OHIO FAIR TRADE LAW ARE CONTRARY TO THE CONGRESSIONAL INTENTION IN ENACTING THE "CONTRACTS AND AGREEMENTS" PROVISIONS OF SECTION 5(a)(2) OF THE McGUIRE ACT. THE PREMISE OF OHIO LAW THAT A FAIR TRADE CONTRACT IS NEITHER VALID NOR ENFORCEABLE AGAINST A "NON-SIGNER" NULLIFIES THE CONDITION FOR ENFORCEMENT AGAINST A "NON-SIGNER" PURSUANT TO SECTION 5(a)(3) OF THE McGUIRE ACT.

Apart from the "critical differences" between the "market organization" plan provided by the 1959 Ohio Act and the Federal enabling legislation, the "notice contracts" sections of the act cannot lawfully be applied to Hudson.

Ohio's objective was to take over the Congressional job of curing the constitutional weaknesses of the non-signer clause. The technique for this objective was to repeal the "contracts or agreements" provisions of Section 5(a)(2) of the McGuire Act by authorizing the "proprietor" of a mark to establish minimum resale prices binding upon "non-signers" by mere notice to distributors—whether such notice be of the price of the trademarked commodity, or of a third party's contract concerning the trade-marked commodity.

As the legislative history of the Ohio Act and the minority opinion in the Supreme Court of Ohio make plain, this is the "implied contract" doctrine.

Upjohn's position upon this issue is summarized at page 45 of its Brief. The propositions there contended for by Upjohn are:

1. If the implied contract between Hudson and Upjohn is included in the phrase "contracts or agreements" in Section 5(a)(2) of the McGuire Act, it is lawful for Up-

john to enforce such contracts or agreements against a person who is a "party" to such contract or agreement under Section 5(a)(3).

2. An implied contract to bind non-signers is now a legally enforceable contract in Ohio and Virginia.

3. *This Court must look to state law* to see whether the implied "contract or agreement" between Hudson and Upjohn qualifies under Section 5(a)(2) of the McGuire Act.

4. Since notice plus "purchase and use of a proprietor's brand-named products" creates a valid contract under Ohio law, it is enforceable against a "party to such a contract" under Section 5(a)(3).

Lilly's position is closely parallel.*

Appellees' position masks the basic premise of the Ohio law that a nonsigner provision is inoperative against Hudson, and the basic premise of Federal law that a notice does not make Hudson a "party" to a contract within the meaning of Section 5(a)(2).

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* The Lilly Brief (pp. 42-55) emphasizes a number of questionable premises: a. The McGuire Act should apply to whatever contract state law might recognize as lawful. b. What contracts are lawful as applied to intrastate transactions are matters for the States to determine. c. The "proprietary interest" conception of Section 1333.31 is simply a legislative reflection of *Old Dearborn Distributing Co. v. Seagram Distillers Corp.*, 299 U. S. 183 (1936). d. Section 5(a)(3) permits enforcement of the legislatively created "notice contract."

A. The Upjohn Brief masks the basic premise of Ohio law that a "non-signer" clause is invalid and may not be enforced in the State of Ohio.

The legislative history of the 1959 Act is replete with evidence that the Legislature of Ohio intended to abide by the holding of *Union Carbide & Carbon Corp. v. Bargain Fair, Inc.*, 167 Ohio St. 182, 147 N. E. 2d 481 (1958) that the non-signer clause is invalid in the State of Ohio.

The spokesman for the Act stated to the Legislature that (R. 209):

> "* * * the Supreme Court * * * apparently objected to a person being bound by the provisions of a contract to which he has in no way been a party. The Court in no way cast any doubt as to the validity and enforceability of a contract between a producer and a distributor providing minimum prices if the distributor was a party to that.
>
> "Does House Bill 318 answer the Court's constitutional objection? We think it does."

The Brief *Amici Curiae of Corning Glass Works, et al.*, filed in this Court, with the Ohio legislative spokesman, Mr. James A. Gorrell as Counsel, further explains at page 32 that "in enacting the new Ohio Fair Trade Act, the Ohio Legislature decided to *shift the emphasis from the non-signer concept and to develop contractual rights and obligations* between the proprietor of a trademark or tradename and the retailer desiring to use that mark in the sale of products." (Italics added.)

The Supreme Court of Ohio carefully omitted to overrule *Union Carbide*.

B. The congressional modification of the *Schwegmann* decision was solely by means of the "nonsigner" amendment to Section 5(a)(3) of the McGuire Act. Since the nonsigner clause is invalid in the State of Ohio, Section 5(a)(3) has no relevance to this case. Congressional sanction for making Hudson a "party to a contract" may be derived solely from Section 5(a)(2).

The "Section by Section Analysis" of the House Committee Report H. Rep. No. 1437, 82nd Cong., 2nd Sess. (1952) at 6 analyzes Section 5(a)(3) to show that Section 5(a)(3) was the vehicle for reaching the "nonsigner."

> "Paragraph (3).—This is a new paragraph, covering the situation presented in the *Schwegmann* case referred to above. It provides that neither the Federal Trade Commission Act nor the antitrust acts shall render unlawful the exercise or the enforcement of any right or right of action created by any law or public policy of any State, Territory, or the District of Columbia which provides that willfully and knowingly advertising, offering for sale, or selling any commodity at less than the prices prescribed in such *contracts*, whether the person so advertising, offering for sale, or selling is or is not a party to the *contract*, is unfair competition and is actionable at the suit of any person damaged thereby."

The legislative history of Section 5(a)(3) leaves no room for the contention that Section 5(a)(3) is a source of the power to "contract" pursuant to Section 5(a)(2). Upjohn makes no reference to the "acrid controversy" which filled 143 pages of the Congressional Record. (98 Cong. Rec., Part IV, 4896-4926; 4933-4956; 98 Cong. Rec., Part VII, 8716-8748; 8819-8858; 8865-8873; 8881-8892.)

As Mr. Reed of Illinois stated:

> "Mr. Speaker, it is quite apparent that among the Members of the House there are three schools of thought on this legislation. Some favor the McGuire bill, some the Keogh bill, and some do not favor any kind of fair-trade legislation whatsoever." (98 Cong. Rec., Part IV, page 4898.)

By the time this three-way controversy was finished, Mr. Priest, the Chairman of the Committee on Interstate and Foreign Commerce, which submitted the Committee Report, stated to the House:

> "We need legislation that will permit the States' fair trade laws to operate as they did operate from 1937 until May, 1951, when the Supreme Court ruled in the Schwegmann case. We need that law, in my opinion, as soon as possible." (98 Cong. Rec., Part IV, at 4947.)

Appellees thus may not view the nonsigner provision as a source for finding a contract under Section 5(a)(2).

C. The recipient of a notice of the price of a trade-marked article, or of another's resale price maintenance contract does not become a party to a "contract or agreement prescribing minimum or stipulated prices" within the "normal and customary" meaning of Section 5(a)(2) of the McGuire Act, since the consensual requirement intended by Congress for a "contract or agreement" is wholly lacking.

There is no suggestion in the entire legislative history that the states were to be free to adopt measures without regard to the limits and guide-lines indicated by Congress. This conclusion is reinforced by the "Section by Section Analysis" of the McGuire Bill.

This "Analysis" clearly shows that "contracts and agreements" in the sense of "contracts" was what the

Committee intended. In discussing Section 5(a)(2), the Committee Analysis refers to a "contract" lawful under State law, and *to a "contract" which requires a vendee to enter into another contract*:

> "Paragraph (2).—With the two exceptions referred to below, this paragraph contains substantially the same provisions as those contained in the first proviso of the Miller-Tydings Act. In substance, this paragraph provides that neither the Federal Trade Commission Act nor any of the antitrust acts shall make unlawful a *contract* prescribing minimum or stipulated prices for the resale of a trademarked commodity in open competition with other commodities when such a *contract* is lawful under applicable State law. This paragraph differs from the Miller-Tydings Act in two respects. First, it includes a provision expressly covering *contracts* which prescribe "stipulated" prices; such *contracts* are not expressly covered by the Miller-Tydings Act. Second, it includes a provision expressly covering a *contract which requires a vendee to enter into another contract* prescribing a minimum or stipulated price; such a *contract* is not expressly covered by the Miller-Tydings Act."

In the "normal and customary meaning" of the words of the McGuire Act, the Ohio statute does not create a "contract or agreement" between Hudson and Upjohn by the mere fact of a price notice prior to the purchase of Upjohn products by Hudson from a wholesaler in Michigan in the course of interstate commerce. It is a highly questionable proposition of law that notice of (i) a retail price for A's trade mark (ii) upon an article owned by B, the wholesaler, and (iii) sold by B to C, the retailer, creates a "contract or agreement" between A and C.

A "notice" is not a "contract or agreement." Neither is a notice of the price on a trade-marked item in the

course of interstate commerce. Neither is a notice of a third party's contract to maintain the price of a trade-marked item. 1 *Williston, Contracts* (3rd Ed. 1957), Section 90E, points out that "if the ultimate purchase is not from the offeror, but from one who has acquired from him absolute and unqualified ownership, it would seem impossible to treat the purchase of the property as consideration for a promise of the purchaser to the original seller, unless at least the facts warranted the assumption that the immediate seller demanded as part of the consideration of the sale a promise to the original seller."

A notice device may cure the failure of the "non-signer clause" if effect is given solely to the Ohio legislative fiat without regard to the Federal enabling law. The notice device will not, however, accomplish a transmutation of the notice device into a "contract or agreement" within any normal and customary meaning of Section 5(a)(2). The purpose of Section 5(a)(3) was to provide the vehicle for enforcement against "non-signers."

D. The content of "contract and agreement" in this Federal statute is for Federal definition, not for definition and alteration by the State of Ohio.

The construction of Federal exemption from anti-trust is a Federal function. If the "notice" herein contended for created a "contract" between Hudson and either of the Appellees, then the interpretation of "contracts or agreements" contended for by Appellees would give the State unlimited power to affect interstate commerce in ways neither intended nor envisaged by the Congress by a State's attempting to exempt from anti-trust price-fixing "intrastate transactions" under "any statute, law, or public policy now or hereafter in effect in any state * * *."

If Appellees are correct in their contention, then the State of Ohio can, as it has done here, arbitrarily place a label upon any price-fixing transaction in the "nature" of a contract in connection with a trade-marked or trade-named commodity and call it a "contract or agreement" for purposes of McGuire.

It is also readily apparent that as soon as the State of Ohio attempts such legislation and seeks to enforce it, then Ohio has destroyed the basic premise of this Court in defining the permissible scope of fair trade legislation. Before the enactment of the McGuire Act, this Court held:

> "A distributor of a trade-marked article may not lawfully limit by agreement, expressed or implied, the price at which or the persons to whom its purchaser may resell, except as the seller moves along the route which is marked by the Miller-Tydings Act."

United States v. Bausch & Lomb Co., 321 U. S. 707, 721 (1944).

After the enactment of the McGuire Act this Court in *McKesson & Robbins*, reiterated both the rule of *Bausch & Lomb* and emphasized the rule of strict construction of resale price maintenance legislation since it creates a "privilege restrictive of a free economy." 351 U. S. 305, 316.

Once the State of Ohio is empowered to redefine the permissible scope and extent of "contracts and agreements," then the door is open for the State to impose any sort of burden upon transactions in commerce and in derogation of anti-trust policy and any other national policy under the commerce clause.

The 1959 Ohio Fair Trade Law, with its concept of "proprietary interest," plainly and adversely affects the transfer of trade-mark provisions in the Lan-

ham Act,* and the labeling provisions of the Pure Food & Drug Act.** Such legislation, with such objectives, is clearly the province of Congress.

It is fallacious for Appellees to argue that Section 5(a)(2) of the McGuire Act authorizes the States to inject a new interpretation of "contracts or agreements prescribing minimum or stipulated prices," because the Federal anti-trust laws are by that section made inapplicable to "contracts or agreements of that description" which "are lawful as applied to intrastate transactions." "Any contracts or agreements" cannot mean any *"kind"* of contracts or agreements.

The resulting power to trench upon the Federal regulation of interstate commerce would be unlimited.

In 1952, as in 1937, Congress was writing legislation to accommodate the then State Fair Trade laws. The contour and pattern of such laws was clearly apparent to the Congress. If the legislation now sought to be justified by

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* The assignment of federally registered marks is controlled by 15 U. S. C. A., Section 1060, which provides in pertinent part:

> "A registered mark or a mark for which application to register has been filed shall be assignable with the *goodwill of the business* in which the mark is used, or with that part of the *goodwill of the business* connected with the use of and symbolized by the mark, and in any such assignment it shall not be necessary to include the *goodwill of the business* connected with the use of any symbolized by any other mark used in the *business* or by the name or style under which the *business* is conducted." (Italics supplied.)

** The "repackaging or otherwise changing the container, wrapper, or labeling of any drug package in furtherance of the distribution" to the ultimate consumer has, by statute enacted Oct. 10, 1962, been included in the terms "manufacture, preparation * * * or compounding," 21 U. S. C. A. Sec. 360(a)(1), Pub. L. 87-781, Title III, Sec. 302, 76 Stat. 794; Sen. Rep. 1744, 87th Cong., 2d Sess. (1962) 2.

The invitation of Section 1333.33(D) to remove "all trace" of trademarks would require Hudson's prior registration and periodic inspection by the Department of Health, Education and Welfare.

the State of Ohio is referable to the McGuire Act, "we could conclude that Congress carved out the vast exception from the Sherman Act now claimed only if we were willing to assume that it took a devious route and yet failed to make its purpose plain." *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U. S. 384 at 395.

E. The legislative history of the McGuire Act affords no basis for a construction of the Ohio statute which would obliterate the distinction between Section 5(a)(2) and Section 5(a)(3) of the McGuire Act, dealing respectively with "signers" and "non-signers."

While the "notice contract" theory of the Ohio Act is derived from the 1958 Virginia law, the remaining substantive provisions and objectives, including the "notice" of "proprietary interest," are derived from the theory of the proposed 1958 Congressional fair trade legislation. This legislation was to be curative of the breakdown of fair trade enforcement by means of the "non-signer clause."

As House Report No. 467, 86 Cong., 1st Sess. (June 9, 1959) explains:

> "This proposed Federal fair trade law (Pars. (5) through (10) of the reported bill) would give the proprietor of a trade mark, brand or trade name the option to fair trade his merchandise, if it is in interstate commerce, or held for sale in any State, the District of Columbia, and Territory of the United States after moving in interstate commerce, *thereby restoring the opportunity to provide for effective resale price maintenance in the 16 States where fair trade laws have been declared unconstitutional in whole or in part,* and creating the opportunity for him to provide for resale price maintenance in the States of Alaska, Missouri, Texas, and Vermont, and the District of Columbia which never enacted such laws." (Italics added.)

It would, therefore, seem plain that the purpose of the 1959 Ohio Act is not to create "contracts and agreements" within the meaning of the McGuire Act, but to create a wholly new approach which would be curative of the State constitutional weaknesses in fair trade enforcement, produced in over twenty-three states by the distinction between the "signer" and "non-signer" of "contracts or agreements" in Sections 5(a)(2) and 5(a)(3) of the McGuire Act.

The latest ruling of "nonsigner" unconstitutionality was by the Pennsylvania Supreme Court in *Olin Mathieson Chemical Corporation v. White Cross Stores, Inc., No. 6, et al.*, 1964 Trade Cases, Par. 71,067 (March 26, 1964).

F. The Virginia courts, in construing the legislation upon which the Ohio "notice contract" provisions are based, have refused to construe the corresponding provisions of the Virginia statute to bind Hudson where Hudson has at most notice of a third party's contract with the "proprietor." Such enforcement would be contrary to the State's policy of non-enforcement of the "non-signer" clause. Hence, the essential condition for application of Section 5(a)(3) of the McGuire Act is absent.

The "non-signer" clause is inapplicable to fair trade legislation in Ohio. *Bargain Fair* so held. The Legislature accepted this premise in enacting the 1959 Fair Trade Law.

As stated in the Brief of Appellant, the only clarity in the Ohio picture is that the 1959 Ohio Fair Trade Act does not reenact the non-signer provisions of the 1936 Act (O. R. C. Sections 1333.05-1333.08).

The interpretation of the notice contract provisions of the Virginia Fair Trade Law, which is the model for the

Ohio statute, also supports Hudson's contention that it is not a "party" to an implied contract with Appellees.

In refusing enforcement of the "notice contract" upon facts parallel with those at bar, the Virginia Courts hold that "* * * the receipt of the commodity from a source other than the manufacturer cannot be deemed an acceptance by the respondent, for the respondent was not a party to the agreement or in privity with either of the parties, and the Fair Trade Act is limited to voluntary agreements. To hold otherwise would be to write into the law that which has been removed from it, to-wit: the 'non-signer' provision." *Bulova Watch Company v. Zale-Norfolk, Inc.*, Appendix B to Hudson Brief in Case No. 489, at 99.

The Ohio law, like the Virginia law, has had removed from it the "non-signer" provision. Any verbal differences in the "notice contract" provisions between the two statutes are immaterial.

It follows from the foregoing that there is a clear failure of the premise of Section 5(a) (3) of the McGuire Act. In the normal and customary meaning of "contracts and agreements," the Federal law precludes Hudson and Upjohn from being "parties" to an *implied contract*. The non-signer policy of Ohio, concurred in by Virginia, precludes enforceability of the notice to Hudson.

There is therefore no "statute, law, or public policy" in effect in Ohio which makes actionable the "offering for sale, or selling any commodity at less than the price or prices prescribed in such contracts or agreements *whether the person so advertising, offering for sale, or selling is or is not a party to such a contract or agreement.*" The public policy of Ohio is explicitly to the contrary in connection with any attempted enforcement against Hudson or other non-party.

G. The Ohio Statute violates the Supremacy Clause.

The attempt by the Ohio Legislature to redefine "contract or agreement" so as to nullify the distinction between the "signer" and "non-signer" provisions violates the Supremacy Clause of the Federal Constitution. It is merely an attempt to repeal Sections 5(a) (2), (3), (4), and (5) of the McGuire Act. In line with the objectives sought by the 1958 Congressional legislation which furnished most of the source for the 1959 Ohio Fair Trade Act, the Ohio Act seeks to destroy the statutory scheme of the McGuire Act as envisaged by Congress and to cure all State constitutional infirmities arising out of the distinction between "signers" and "non-signers" by making "contractors" of every person handling trade-marked merchandise in interstate commerce.

H. Severability is continually decried by Appellees as simply an issue of "State interpretation" of a statute. (e.g. Upjohn Brief, 52.)

The Trial Court found the statute to be unitary and entire. There is no suggestion to the contrary in the rulings of the Court of Appeals, and of the Supreme Court.

The issue is of importance since the 1959 Act does contain valid elements; to wit, those still appearing in the 1936 or traditional type of Fair Trade Act *apart from the non-signer clause.* (O. R. C., Sections 1333.05-1333.08.)

The contention that "severability" is strictly an issue for the State Courts derives from a denial of the premise that compliance by state legislation with Federal enabling laws is a matter for determination by the federal courts, not by the State courts. Moreover, the precedent cited by Upjohn at page 52 of its Brief, *Dorchy v. Kansas*, 264 U. S. 286 (1924) has no relationship to federal enabling

legislation; but this case also recognizes the power of the Federal court as to make its own determination of severability. (264 U. S. at 291.)

VI. BY CREATING A CONCEPTION OF A "PROPRIETARY INTEREST" IN A TRADEMARK SEPARATE FROM THE PRODUCT, WITHOUT THE AUTHORIZATION OF THE FEDERAL ENABLING LEGISLATION, THE 1959 OHIO LAW VIOLATES THE DUE PROCESS REQUIREMENT OF THE FOURTEENTH AMENDMENT. *OLD DEARBORN* WHICH DEALT SOLELY WITH LOCAL COMMERCE PRIOR TO ANY FAIR TRADE ENABLING LEGISLATION HAS NO RELEVANCE TO THIS CASE.

Every petition and every brief filed by Hudson in these litigations has argued that the Fair Trade legislation accomplishes an unlawful deprivation of due process of law. The due process clause of the Federal Constitution is mentioned specifically in Hudson's petitions for declaratory judgment.

Both in the trial court and in the Court of Appeals, the due process issue was extensively briefed. The State and Federal constitutional provisions are specifically referred to, both in Hudson's Briefs in Support of Petition in the trial court, and in Hudson's Briefs as Appellee (Appendix A, *infra*, pp. 46, 52 and Appendix C, *infra*, p. 68).

In the Supreme Court of Ohio, Hudson's Brief of Plaintiff-Appellant extensively argued the due process issue (pp. 30-44). In connection with this issue, Hudson discussed the Federal concepts and precedents concerning the proper role and function of trademarks, the Federal and Ohio food and drug laws regulating misbranding in commerce, and the criticism by the Federal Departments, in connection with the Harris Bill, of the notion of a "proprietary interest" separate from the product. Hudson's

Reply Brief of Plaintiff-Appellant in the Supreme Court of Ohio (pp. 27-37) also extensively discussed the due process issue. Hudson argued the lack of power of the Ohio Legislature to create a "proprietary interest" in trademarks, and cited the limitations on the transferability of trademarks separate from goodwill imposed by the common law and the Lanham Act.

In every Brief in every Court Hudson also argued the failure of the Ohio fair trade law to give opportunity for notice and hearing before the legislative function of price-setting was exercised by private parties.

Thus every aspect of due process was argued by Hudson at every level in the courts below, with specific reference to the Federal statutes which might bear upon the concept of "proprietary interest" such as the Lanham Act, and the Federal Food, Drugs and Cosmetics Act; and reference was made to the position of the Federal Departments upon the concept of the severability of trademarks from product.

Disregarding the foregoing, Upjohn now argues to this Court that the due process question "was not discussed in Hudson's brief in the trial court and was abandoned in the Court of Appeals and the Ohio Supreme Court" (Upjohn Brief, p. 31). Lilly argues that *Old Dearborn* has settled the constitutional issue (Lilly Brief, 61-67). Both Appellees view the issues as foreclosed because, in their opinion, the action of the Ohio Legislature falls within the doctrine of *Ferguson v. Skrupa*, 372 U. S. 726, 730-731 (1963).

In taking this position, Appellees omit the qualifying phrase of the *Ferguson* case, that States might regulate their commercial and business affairs "so long as their laws do not run afoul of some specific federal constitutional

prohibition, or of some valid federal law." In this case, the enactment of the Ohio Legislature accomplishes *both* prohibited objectives, the violation of the Supremacy Clause and a number of Federal statutes.

Neither the "debt pooling" problem of *Ferguson*, nor the "right to work" issue in *Lincoln Federal Labor Union v. Northwestern Iron & Metal Co.*, 335 U. S. 525, 536 (1949) arose in the context of a state statute *which can achieve life only within the confines of a Federal enabling exemption from the antitrust laws.*

Old Dearborn, also relied upon by Appellees as divesting any due process issue from this case, was decided in 1936, and dealt solely with issues of due process under the Constitution of the State of Illinois in connection with transactions then construed to be intrastate. The invitation in *Old Dearborn*, 299 U. S. at 195, to the purchaser to remove "the mark or brand from the commodity—thus separating the physical property, which he owns, from the good will, which is the property of another—" was extended prior to the enactment of any of the federal legislation bearing upon the case at bar, let alone legislation like Ohio's which also seeks rights of regulation over business practices of Appellant.

The *Ferguson* and *Lincoln Federal* precedents relied upon by Upjohn have no correlation with supervening Federal enactments which created the fair trade exemptions from antitrust, and which regulate the "bundle of rights" in trade-marked commodities in the stream of interstate commerce.

The first of these "bundle of rights" would appear to be that no State may create for its citizens a "fair trade" exemption as the vehicle for "leveraging" the destruction of other rights created by other equally valid

Federal enactments. Congress in the Lanham Act has clearly indicated its intention to preempt the regulation of trademarks in commerce, including the conditions surrounding the transfer of trademarks in commerce. 15 U. S. C., Sections 1127, 1060. The trademark may not validly be divorced from the "good will" with which it is associated.

Nor may the right of a State to enact valid intrastate resale price maintenance legislation be utilized as the means of effecting the recall of the judicial decisions of this Court defining the proper area within which businessmen may assert rights to trademarks after commodities bearing the mark have left their ownership and control and have been resold to third parties in commerce

Champion Spark Plug Co. v. Sanders, 331 U. S. 125 (1947);

Prestmettes, Inc. v. Coty, 264 U. S. 359 (1924).

Lilly concedes the plain repugnance of the Ohio law to established doctrines of trademark infringement. "Obviously, Lilly could not treat Hudson as a tort-feasor if Hudson exercised its right to substitute the label for Lilly's." (Lilly Brief, at 60.)

Moreover the Federal antitrust enabling exemption for fair trade legislation does not authorize a State, by such legislation, Sec. 1333.33(D) to require people to remove drug labels to avoid "fair trade" and thereby to defeat the policy expressed in the Federal Food, Drug and Cosmetic Act. 21 U. S. C. A., Sections 301, [redacted], *et seq.* 360

The action of the State of Ohio in attempting to define and maintain a "proprietary interest" by a manufacturer in the hands of a subvendee finds no precedent in trademark law. It also finds no precedent in the words of the

Miller-Tydings or the McGuire Acts. It is merely a bold, arbitrary taking of property in the interest of price maintenance, contrary to the principle that State power is here derived not from the state constitution—as in *Ferguson* and *Lincoln Federal*—but from Federal enabling legislation.

When the State of Ohio steps beyond the express confines of the Federal enabling legislation, to authorize price-fixing in commerce, it would seem clear that any claimed protection afforded by the "economics" or "police power" of fair trade falls away. The action of the State has then, in the words of *Ferguson*, run afoul of "some specific federal constitutional prohibition, or of some valid federal law."

It is therefore urged that this Court reconsider *Old Dearborn*, not in the intrastate context as originally posed, but rather in the light of the various aspects of interstate commerce which have intervened since 1936.

CONCLUSION.

Appellant prays that this Honorable Court, in the exercise of its jurisdiction pursuant to 28 U. S. C., Section 1257(2), reverse the judgment of the Supreme Court of Ohio, and declare, for the reasons herein set forth, that Ohio Rev. Code, Sections 1333.27 through 1333.34 is unconstitutional by reason of conflict with the Supremacy Clause of the Constitution of the United States and violation of the Due Process Clause of the Fourteenth Amendment.

Respectfully submitted,

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APPENDIX A.

OUTLINE OF QUESTIONS PRESENTED AND LITIGATED IN OHIO COURTS DURING UPJOHN LITIGATION.

Contrary to the various statements made in Upjohn's Answer Brief, the history of this litigation in the Ohio courts confirms that (a) each and every issue was raised or assumed by the parties to be raised in the pleadings, (b) was presented by the evidence, (c) was considered by the parties and by the respective trial and appellate courts and thus preserved for the appeal thereafter taken to this Court.

In the Jurisdictional Statement submitted by Hudson herein, five (5) separate and distinct questions are posed with respect to the constitutionality of the Ohio Fair Trade Act (Jurisdictional Statement, pages 4 and 5):

Question 1 relates to the authority granted to a "proprietor" of a trademark or trade name to establish minimum resale prices for wholesalers with whom the proprietor is in competition (the "McKesson case" issue).

Question 2 relates to horizontal price fixing and boycotting agreements made permissible by the Act (the "horizontal agreement" issue).

Question 3 relates to the authority granted to proprietors to compel contracts to maintain minimum resale prices without consensual agreement (the "notice" issue).

Questions 4 and 5 relate, respectively, to violation of federal due process and the lack of severability of the illegal provisions from the balance of the Fair Trade Act (the "due process" and "severability" issues).

A. The Court of Common Pleas.

All five (5) issues were raised in the litigation in the Court of Common Pleas; thereafter, the same issues were urged and considered by the respective Ohio courts and

ultimately determined by the decision of the Ohio Supreme Court rendered on May 8, 1963.

1. In the Court of Common Pleas, Hudson's Petitions for Declaratory Judgment and the evidence thereunder clearly raised all Federal issues.

The focus of each of Hudson's petitions for declaratory judgments was the direct challenge of the Ohio Fair Trade Act on both state and federal constitutional grounds. The initial petition for declaratory judgment was filed by Hudson on August 28, 1959 (R. 1-4). An amended petition for declaratory judgment was filed on October 28, 1959 (R. 5-7). Both petitions generally charged violation of federal due process and conflict under the Supremacy Clause of Article VI, Clause 2 of the United States Constitution between the Ohio Fair Trade Act and the Sherman Antitrust Act, the Miller-Tydings Act and the McGuire Act.

Hudson's second amended petition for declaratory judgment was filed in the Common Pleas Court on January 11, 1960 and is reproduced at pages 8 through 13 of the Transcript of Record. As in the case of the preceding petitions, such petition in Subparagraph B thereof alleges violation of the Supremacy Clause by reason of conflict between the Ohio Act and the Sherman Antitrust Act, the Miller-Tydings Act and the McGuire Act. The general specifications of illegality contained in Paragraph B are stated to apply to the enumerated Revised Code provisions thereafter appearing. Such code provisions are thereafter set forth in Subparagraphs B(1), B(2), B(3), and Paragraphs C and D, which sections contain additional specifications of incompatibility between the Ohio statute and federal law.

Subparagraph C alleges *the denial of federal due process;* the *horizontal agreement issue* is posed both in

Subparagraph B(1) and Paragraph C; the *notice issue* is specifically set forth in Subparagraph B(2); *severability* in Paragraph D.

The *McKesson issue* was recognized by the parties to be encompassed by the pleadings. The Stipulation re Evidence (R. 30) put in evidence the Smith Deposition disclosing Upjohn's wholesale marketing arrangements and McKesson and Upjohn's solicitation of the same retail accounts, the Smith Affidavit disclosing the *del credere* agency arrangement with McKesson (R. 101-109), the Block Affidavit challenging on grounds of estoppel McKesson's status as a *del credere* agent and describing the competition between Upjohn and McKesson for the business of the retail druggist (R. 70-83), and the Affidavit of Hudson's Counsel (R. 56-60).

Paragraph D of the second amended petition raised the general allegation of illegality, declaring that the entire Fair Trade Act, Sections 1333.27 through 1333.32, are in conflict with both state and federal constitutions and hence null and void. Thus, both generally and specifically, Hudson's second amended petition raises the five (5) issues presented on the instant appeal.

2. Hudson's briefs in support of the allegations contained in the petition contain extended discussions and issues of each of the five (5) questions now presented.

As the Docket Entries show (R. 367-370), Hudson filed three Briefs and a "Memorandum re antitrust effects of *del credere* agency contract." The thrust of these briefs was principally an attack of the Ohio Fair Trade Act on Federal grounds.

The Table of Contents for the Brief in Support of Petition was as follows:

The *McKesson issue* was specifically discussed in Hudson's initial Brief in Support of Petition at pages 5, 6, 9 and 10. Both the Common Pleas Court and Upjohn were thus apprised that the *McKesson issue* was directly tendered.

The *McKesson issue* was tendered, moreover, in virtually the identical posture presented to this Court, pages 9 and 10 of such brief, reading in part as follows:

"D. *The Ohio Fair Trade Law Authorizes the Making of Contracts at Competitive Levels of Distribution Despite the Express Prohibitions of the McGuire Act.*

As has already been pointed out, Section 1333.29 (A) provides:

"A proprietor may so establish such minimum resale prices for his wholesale distributors, notwithstanding section 1333.34 of the Revised Code, even though he sells such commodity to retailers in competition with such wholesale distributors, if such sales to retailers are made at prices not less than those he establishes for such wholesale distributors for comparable sales."

It is impossible to square this provision of the new Ohio Fair Trade Act with Section 5 of the McGuire Act and *United States v. McKesson & Robbins, Inc.*, 351 U. S. 305 (1956).

It is immaterial that, as Mr. Smith pointed out in his deposition, there is a price differential between Upjohn's direct sales to retailers and the McKesson & Robbins offering to the same retailers (Deposition, page 45). As the Supreme Court said in *McKesson Robbins,* since appellee competes 'at the same functional level' with each of the 94 wholesalers with whom it has price fixing agreements, 'the proviso prevents these agreements from falling within the statutory exemption.' The court further states, in rejecting economic arguments of the parties to the appeal:

"Congress has marked the limitations beyond which price fixing cannot go. We are not only bound by those limitations but we are bound to construe them strictly, since resale price maintenance is a privilege restrictive of a free economy."

It follows from the foregoing that the provisions of the new Ohio Fair Trade Act which permit the doing of what Congress has expressly interdicted, namely, the making of fair trade contracts with wholesalers, is in flat contradiction and violation of federal law."

Yet another reference to the *McKesson issue* was made by Hudson in its "Supplemental Memorandum re Antitrust Effects of Del Credere Agency Contract" filed with the Common Pleas Court on March 26, 1960, which quoted at length from the brief of the United States in *United States vs. McKesson and Robbins, Inc.*, 351 U. S. 305 (1956) dealing with the illegality under Section 5(a)(5) of the McGuire Act of *del credere* agency arrangements between competing wholesalers.

Upjohn's contention (Upjohn Brief at 14) that the *McKesson issue* derives *solely* from the allegations made in Hudson's "Second Amended Reply to Answer and Answer to Cross Petition" filed on June 16, 1960 (Transcript of Record, pages 27 through 30), is wholly without foundation. It is true, of course, that the *McKesson issue* was also therein raised since it was directly related to Upjohn's standing to sue and to the allegations asserted by Upjohn in its cross-petition relative to its distribution system. This in no way alters the further fact, however, that the *McKesson issue* was present in this litigation since its inception, which is clearly demonstrable from the foregoing.

3. Upjohn joined issue on the Federal questions.

In the face of plaintiff's direct attack on the Ohio Fair Trade Law on Federal grounds, Upjohn of necessity was forced to join issue on these questions. In Upjohn's "Memorandum in Support of Defendant's Motion for Summary Judgment on Plaintiff's Petition for Declaratory Judg-

ment," Upjohn at pages 43 and 44 specifically answered the federal constitution issues, contending, first, that there was no interstate commerce, and, second, that the McGuire Act "clearly and explicitly" exempts the legislation here in question.

Again, in defendant's Supplemental Brief and the index to such Brief, Hudson stated:

> "The Miller-Tydings Act has no bearing upon the constitutionality of the Fair Trade Act."

This issue was discussed at pages 26 through 29 in such Brief. Certified copies of the Briefs of the parties have been deposited with the Clerk of this Court.

4. The decision in the Court of Common Pleas plainly indicates that the parties had joined issue on the Federal questions.

The Trial Judge's opinion clearly showed his consideration of the relationship between the federal and state enactments. The court considered such conflict and, as urged by Hudson, found an incongruity between the rights sought to be conferred upon the holder of a trade mark and that possessed by the holder of a patent. Said the Court:

> "The argument is made that since the power to fix prices was available at common law, the Fair Trade Act only [fol. 428] restores this right; and therefore, cannot be a delegation of legislative power. With this argument, the court cannot agree. The act is not to nullify the Valentine Act, but to be an exception to it. *The Fair Trade Act only has existence because Congress made such acts an exception to the Sherman Act. Its existence does not stem from a common law right, but it stems as a specific exemption to the Sherman Act,* and only has life as it fits the exemption. The Fair Trade Act itself rebuts this argument. The legislature specifically granted a propri-

etary interest in a trade-mark or name, and gave this right to anyone holding this interest to set minimum prices. This right did not exist at common law to the holder or assignee or designee of a trade-mark or name. He may have the right to set prices generally at common law, but not because of his proprietary interest in his trade-mark. For common law rights of trade-marks generally, see: *U. S. v. Timken,* 83 F. Supp. 284 (at p. 315). *This right granted to a holder of a trade-mark is greater than that possessed by the holder of a patent. U. S. v. Masonite,* 62 S. Ct. R. 1070; 316 U. S. 265. This is a specific legislative enactment that gives a holder of a trade-mark or name a right he did not possess previously. This was clearly denoted in the *Union Carbide* case, *supra.*" (Record, page 375)

Judge McNeill's decision also specifically noted that the issues raised in the briefs were considered by the court although not discussed in the Opinion in view of the court's finding of lack of constitutionality on state grounds, the court stating:

"The court deciding this issue as it has, other questions concerning the act raised in the briefs are not discussed."

5. The Court of Common Pleas also decided the Severability Issue Adversely to Upjohn.

The Journal Entry recorded in the Court of Common Pleas not only recited the finding of unconstitutionality but also stated that the provisions of the Ohio Fair Trade Act were "integral and inseparable," necessitating the vitiation of the entire legislative enactment.

Upjohn itself subsequently conceded the scope of the issues which were before the trial court. At page 24 of its brief to the Court of Appeals for Cuyahoga County, it stated:

"Inasmuch as the court below rested its decision upon the delegation of authority argument, an extended analysis of the other constitutional objections raised by plaintiff in the court below is perhaps unnecessary."

Of the five (5) issues presently posed to this Court, then, each was posed to the Court of Common Pleas prior to its judgment on July 28, 1960. As will be hereafter observed, each of such issues was also presented and considered by the Ohio Appellate and Supreme Courts and decided adversely to Hudson.

B. Proceedings in Court of Appeals.

1. Hudson's Brief, as appellee in the Court of Appeals for Cuyahoga County, was a reiteration of the Federal argument that had been presented to the trial court.

The table of contents of Hudson's Brief in the Court of Appeals reflects four (4) of the five (5) issues raised in the instant appeal were presented to the Appellate Court, (the *McKesson*, the *horizontal agreement*, the *notice* and the *severability* issue):

"I. The New Ohio Fair Trade Law Is in Violation of Section 5 of the McGuire Act.

A. The Ohio Fair Trade Law Violates the McGuire Act which Specifically Prohibits Horizontal Price Fixing.

B. The Upjohn Company Has Given Notice to Distributors and to Retailers of Both Wholesale and Retail Fair Trade Prices, with Upjohn Directly Competing with Its Wholesalers for the Business of Retailers.

C. The Attempted Defense of The Upjohn Company, Based on "Del Credere" Agency Agreements, was Specifically Disapproved by the Supreme Court of the United States in the Masonite Case.

D. The Ohio Fair Trade Law Authorizes the Making of Contracts at Competitive Levels of Distribution Despite the Express Prohibitions of the McGuire Act.

E. The Illegal Provisions of the Ohio Fair Trade Law Are Not Severable.

* * * * *

III. The New Ohio Fair Trade Law Could Be Validly Enacted Only by the Congress of the United States."

The fifth issue, *federal due process*, was also raised in the text of the brief. At Page 23 of Hudson's brief, it was noted:

> "Such protection may not be achieved at the expense of constitutional guarantees and freedoms. Hudson has discussed in its Brief in the companion *Lilly* Appeal to this Court why the Fair Trade Law constitutes an unlawful delegation of legislative power and a deprivation of due process, in addition to a gross abuse of the police power."

The discussion to which reference is made in the Lilly brief appears therein under the title "The Notice Provisions and Nonsigner Provisions of the Ohio Fair Trade Act Deprive the Plaintiff of Its Property Without Due Process of Law." Hudson therein equated the due process requirements of Article I, Sections 1 and 19 of the Ohio Constitution with the due process guarantees of the Fourteenth Amendment to the United States Constitution. Said Hudson:

> "These provisions of the Ohio Constitution give to every person the assurance that his rights in and to property shall not be disturbed by governmental action. Similar protection is afforded by the Fourteenth Amendment to the United States Constiution."

2. Upjohn joined issue on the Federal questions in the Court of Appeals.

Once again Upjohn necessarily joined issue with Hudson on the federal issues posed. Upjohn specifically argued at page 17 of its Reply Brief that intrastate transactions were not reached by the McGuire Act and that there was no collision between the provisions of the Ohio Fair Trade Act and the *McKesson and Robbins* decision. (Brief, pp. 16-17.)

3. In opposing Hudson's Petition for Rehearing, Upjohn insisted that the Court of Appeals had considered and overruled all Federal questions.

Following the submission of briefs, oral argument and the decision of the Court of Appeals, Hudson petitioned the court for a rehearing on the grounds that the court did not appear to have sufficiently considered the impact of the Supremacy Clause of the Federal Constitution on the validity of the Ohio statute, the creation of an implied contract under the facts of this case (that is, that all plaintiff's goods were purchased outside Ohio), and the effect of Section 5(a)(5) of the McGuire Act. (R. 409-410.) Four (4) out of the five (5) issues are reflected in the Petition for Rehearing.

Upjohn's Brief in Opposition to Petition for Rehearing emphasized the "ludicrousness" of the contention being made to the Court of Appeals by Hudson:

> "None of the points raised by the applicant for reconsideration in the instant case are new. All were treated far more extensively in the original briefs submitted to the court. All were argued orally by counsel for the applicant at the hearing before this Court.
>
> * * * * *

Starting on page 1 and continuing on page 22 of applicant's initial answer brief in *The Upjohn Company* case, counsel for the applicant opened up the very same attack he is not asserting. In applicant's initial answer brief in the *Eli Lilly* case fully 12 pages (16-27) are devoted to development of the same point.

More importantly, the majority in its opinion clearly considered the questions raised by Federal statutes so that applicant's assertion that this Court missed the 'impact of the Supremacy Clause of the Federal Constitution' *borders on the ludicrous.* This Court in its majority opinion discussed the evolution of Federal Statutory Law and the significant Federal decisions regarding fair trade in painstaking detail on pages 8 to 25. The Court properly concluded that the implied contract provision of the new act did not offend constitutional provisions (p. 38, opinion).

* * *

In short, the present application raises points that are not new, were more extensively briefed before, and were given consideration and rejected by the Court." (Emphasis added.)

Certified copies of all Briefs of the parties in the Court of Appeals have been deposited with this Court.

4. The Judgment of the Court of Appeals encompassed the Federal questions.

Thirteen (13) days after the filing of Upjohn's Brief in Opposition to the Petition for Rehearing, the Court of Appeals denied Hudson's request and entered its Journal Entry, which pointedly showed its consideration of the federal as well as the state issues. The Judgment of the Court stated in part:

"1. Sections 1333.27 through 1333.34 of the Ohio Revised Code are valid, lawful, and enforceable enactments of the Ohio General Assembly and are neither

in violation of the Constitution of the State of Ohio, nor in violation of the Constitution of the United States." (R. 411-412.)

Upjohn's present argument that the federal issues were not considered by the Appellate Court in Ohio flatly contradicts the unambiguous language used by the court and its own contentions. It also overlooks the fact that the finding of state constitutionality could not have been reached without the corollary finding of federal constitutionality.

C. Appeal to Ohio Supreme Court.

Within the period prescribed by Ohio law, Hudson filed with the Supreme Court of Ohio its Notice of Appeal from the decision rendered by the Cuyahoga County Court of Appeals. Two (2) grounds were specified in this Notice of Appeal: (a) a case involving a constitutional question; (b) on condition that a motion to certify be allowed by the court.

Pursuant to the second ground urged in the Notice of Appeal, Hudson filed with the Ohio Supreme Court a motion for an order requiring the Court of Appeals to certify its record to that court for consideration and decision. Following the liberal appeal procedures in effect in Ohio, the motion merely recited that:

> "The cause and questions involved herein are of public and great general interest, as will be more fully disclosed by the briefs to be filed."

1. The Brief in Support of Motion to Certify Record clearly raised the Federal questions.

Rule 8, Section 3 of the Rules of the Supreme Court of Ohio requires that the specific assignment of error be contained in the brief in support of such motion, together with

"a statement of the questions of law presented." By Rule 8, Section 4, a like requirement is imposed upon appellee's brief.

In response to such rules, in its Brief in Support of Motion to Certify Record, p. 1, Hudson stated for its second Assignment of Error:

> "For its second assignment of error, plaintiff-appellant states that the Court of Appeals for Cuyahoga County erred in finding that Sections 1333.27 through 1333.34, inclusive, of the Ohio Revised Code are valid, lawful and enforceable enactments of the Ohio General Assembly and do not violate either the Constitution of the United States or any law of the United States.
>
> II. Is the Ohio Fair Trade Law, Ohio Revised Code, Sections 1333.27 through 1333.34, inclusive, violative of the Constitution of the United States or of any law of the United States?
>
> The Court of Appeals for Cuyahoga County answered: 'No.'
>
> Plaintiff-appellant contends the answer should be 'Yes.'"

Hudson's statement (p. 2) of the second Question of Law involved on the appeal similarly stated:

> "II. Is the Ohio Fair Trade Law, Ohio Revised Code, Sections 1333.27 through 1333.34, inclusive, violative of the Constitution of the United States or of any law of the United States?
>
> The Court of Appeals for Cuyahoga County answered: 'No.'
>
> Plaintiff-appellant contends the answer should be 'Yes.'"

The argument in the Brief in Support of Motion to Certify Record (p. 18) stated in part:

> "Grave questions also exist as to whether the new Ohio Fair Trade Act violates the Supremacy Clause of

the United States Constitution by exceeding the bounds set for fair trade legislation by the McGuire Act, 15 U. S. C., Section 45 and the Miller-Tydings Act, 15 U. S. C., Section 1. The federal enabling legislation requires the entry into *actual contracts* under State Fair Trade Laws, not mere 'contracts by notice.' Moreover, the McGuire Act specifically prohibits a manufacturer from fair trading at the wholesale level when he is in competition with his wholesalers for the custom of a retailer. The new Ohio Fair Trade Law specifically permits such unlawful horizontal price fixing."

2. Upjohn joined in Hudson's Motion to Certify on Federal grounds.

In its Answer of The Upjohn Company to Brief in Support of Motion to Certify Record, filed by Upjohn with the Supreme Court of Ohio, Upjohn, while reserving its rights to oppose *on the merits* the assignments of error urged by Hudson, nonetheless joined in submitting the issues posed by Hudson to the court for its consideration and judgment. Upjohn's Brief first specifically noted that the assignments of error included federal issues:

> "An appeal was taken to the United States Supreme Court (Standard Drug v. General Electric, Case No. 127 of the 1961 Term) and on October 9, 1961 the Supreme Court sustained a motion to dismiss the appeal for want of a substantial federal question, thus laying to rest the second assignment of errors advanced by appellant herein that the Ohio Fair Trade Act violates a Federal law or the United States Constitution." (p. 3.)

The Upjohn Brief then concluded by joining in the Motion:

> "Thus appellee, while in no way admitting or conceding any merit to the assignments of error or argu-

ment presented by appellant in support of those assignments of error, *joins with appellant in requesting that the motion to certify of appellant be granted.*" (p. 4).

3. Hudson's Briefs in the Supreme Court of Ohio clearly raised the Federal questions.

On Jan. 10, 1962, the Supreme Court allowed the Hudson appeal on both grounds specified in its notice of appeal, that is, as a case involving constitutional questions and on the court's allowance of Hudson's motion to certify. Hudson thereupon filed its Brief on the Merits with the court.

As the partial excerpt from the table of contents of Hudson's Brief hereafter demonstrates, the full range of federal questions now presented to this court were likewise presented to the Supreme Court of Ohio:

The table of contents of Hudson's Reply Brief likewise states in part:

The scope of Hudson's briefs, both in the Court of Appeals and in the Supreme Court of Ohio, are of particular import by virtue of the requirements of Ohio appellate practice that issues urged by brief on appeal be heard and decided by the Appellate Court. This requirement is contained in Ohio Revised Code, Section 2505.21, reference to which has been made by Hudson at pages 6-7, *supra*.

4. Upjohn joined issue on the Federal questions.

As in the Court of Common Pleas, as in the Court of Appeals, and pursuant to Upjohn's joinder in Hudson's motion to certify, Upjohn again joined issue on the Federal questions raised. Its Answer Brief filed therein:

> "All doubt concerning any federal question or infirmity under the federal laws in the new Ohio type Fair Trade Act has now expressly been laid to rest by the Supreme Court itself. Subsequent to the ruling on these questions by the Supreme Court of Virginia, an appeal raising these federal questions was taken to the United States Supreme Court in Case No. 127 and that Court dismissed the appeal on the ground that 'no substantial federal question' was presented. In order that this Court may satisfy itself that all conceivable federal questions were thoroughly raised in that case, a copy of the jurisdictional statement in that case is attached hereto as Appendix C.
>
> The Supreme Court of the United States is, of course, the ultimate arbiter of the existence or non-existence of a 'federal question' and whether or not a state statute in a given situation violates either federal law or the Constitution of the United States. In acting upon the Virginia statute, after which the Ohio Act was patterned, the Supreme Court found that the Standard Drug case, arising upon that statute, did not present a 'substantial federal question'." (page 69.)

D. All Federal Issues were properly raised and resolved in the Courts below.

It is clear that the Federal issues raised in the instant appeal were not only considered but decided by the Supreme Court. The obligation to consider the questions raised by Hudson was imposed upon the Ohio Supreme Court by statute. Moreover, the opinion specifically recites that "none of the constitutional attacks on this new Act have merit." (R. 424.)

Nowhere does the Ohio Supreme Court decision state or imply that the federal issues posed by Hudson were not preserved below or ripe for determination. Likewise, no such statement or inference is contained in the decision of the Court of Appeals, where the same issues were urged.

In short, Upjohn's present contentions are at odds with Upjohn's position in the courts below, with the pleadings, with the briefs filed in the Ohio courts by both Hudson and Upjohn, with Ohio appellate procedure, and with the express statements by the Ohio appellate Courts that they had considered and rejected the federal issues posed by Hudson.

APPENDIX B.

No. 730,118.

IN THE COURT OF COMMON PLEAS.

STATE OF OHIO, COUNTY OF CUYAHOGA, SS.

HUDSON DISTRIBUTORS, INC.,

Plaintiff,

vs.

ELI LILLY AND COMPANY,

Defendant.

MOTION TO STRIKE SECOND DEFENSE OF SECOND AMENDED ANSWER TO CROSS-PETITION; DEMURRER TO THIRD DEFENSE OF SECOND AMENDED ANSWER TO CROSS-PETITION; AND DEMURRER TO INTERROGATORIES ATTACHED TO SECOND AMENDED ANSWER TO CROSS-PETITION.

MOTION TO STRIKE SECOND DEFENSE OF SECOND AMENDED ANSWER TO CROSS-PETITION.

Now comes the defendant, Eli Lilly and Company, and respectfully moves the Court for an order striking the Second Defense of the plaintiff's Second Amended Answer to Cross-Petition for the reason that the plaintiff is barred from now asserting this defense.

DEMURRER TO THIRD DEFENSE OF SECOND AMENDED ANSWER TO CROSS-PETITION.

Now comes the defendant and demurs to the third defense of the Second Amended Answer herein on the grounds that it appears on the face of the Second Amended

Answer that it does not contain sufficient facts to constitute a defense to the cause of action contained in the Cross-Petition.

DEMURRER TO INTERROGATORIES ATTACHED TO SECOND AMENDED ANSWER TO CROSS-PETITION.

The defendant demurs to the Interrogatories attached to the Second Amended Answer to the Cross-Petition, Nos. 1, 2, 3, 4, 5, 6A, 6B, 8, 9, 10, 11, 12, 13, 14 and 15, on the ground that none of such Interrogatories is material or pertinent to the cause of action contained in the Cross-Petition.

HENDERSON, QUAIL, SCHNEIDER & PEIRCE,
Attorneys for Defendant.

BRIEF IN SUPPORT OF MOTION TO STRIKE SECOND DEFENSE OF SECOND AMENDED ANSWER TO CROSS-PETITION.

* * * * *

BRIEF IN SUPPORT OF DEMURRER TO THIRD DEFENSE OF SECOND AMENDED ANSWER TO CROSS-PETITION.

Plaintiff states as a Third Defense that defendant's form of fair trade contract illegally compels retailers to enter into unlawful horizontal price fixing agreements with competing retailers.

Defendant's fair trade contract was attached to the Cross-Petition as Exhibit B, and is a part of the record in this case. The validity of defendant's contract was an issue in the earlier proceedings before this Court and before the Court of Appeals for Cuyahoga County. This Court, although finding the Ohio Fair Trade Act unconstitutional, did not suggest any infirmity in the form of defendant's contract. The Court of Appeals held the Act constitutional and upheld the validity of the defendant's contract under

the Act; that holding was affirmed by the Supreme Court of Ohio.

This Third Defense has already been adjudicated in this proceeding. The defendant's Demurrer should be granted.

BRIEF IN SUPPORT OF DEMURRER TO INTERROGATORIES ATTACHED TO SECOND AMENDED ANSWER TO CROSS PETITION.

* * * * *

5. Interrogatory No. 15 relates to the plaintiff's charge, contained as the Third Defense of its Second Amended Answer to the Cross-Petition, that defendant's form of fair trade contract with retailers compels retailers to enter into illegal horizontal price fixing agreements. As stated in the foregoing Brief in support of the Demurrer to this Third Defense, the defendant's fair trade contract was upheld by the Court of Appeals of Cuyahoga County, and this determination was affirmed by the Ohio Supreme Court. Accordingly, Interrogatory No. 15 is not pertinent.

Respectfully submitted,

HENDERSON, QUAIL, SCHNEIDER & PEIRCE,
Attorneys for Defendant.

SERVICE.

A copy of the foregoing Motion to Strike Second Defense of Second Amended Answer to Cross-Petition; Demurrer to Third Defense of Second Amended Answer to Cross-Petition; and Demurrer to Interrogatories Attached to Second Amended Answer to Cross-Petition, together with the Briefs in support of same, was delivered this 9th day of July, 1963, to Lane, Krotinger and Santora, attorneys for plaintiff.

HENDERSON, QUAIL, SCHNEIDER & PEIRCE,
Attorneys for Defendant.

APPENDIX C.

OUTLINE OF QUESTIONS PRESENTED AND LITIGATED IN OHIO COURTS DURING LILLY LITIGATION.

Contrary to the various statements contained in Lilly's Answer Brief, each and every issue raised by Hudson's Jurisdictional Statement was raised in the pleadings, presented and considered by the respective trial and appellate courts of the State of Ohio, and thus preserved for the appeal taken to this Court. The issues were raised at the beginning of litigation in the Court of Common Pleas in January of 1960 with the filing of Hudson's Amended Petition for Declaratory Judgment, they remained in the case and were considered and decided by the Ohio Supreme Court in its decision on constitutionality rendered May 8, 1963. It is hardly surprising that this should be so, inasmuch as the focus of the Declaratory Judgment Petition was the direct challenge to the Ohio Fair Trade Act on State and Federal Constitutional grounds.

Five basic questions are presented by Hudson in the Jurisdictional Statement filed with this Court. (Pages 4 and 5 of Hudson Jurisdictional Statement.) As characterized by Appellee, Lilly, on pages 2 and 3 of the Answer Brief filed herein, these questions are:

(a) The "McKesson Case" issue;

(b) The "Horizontal Agreement" issue;

(c) The "Notice" issue;

(d) The "Due Process" issue; and

(e) The "Severability" issue.

A. The Court of Common Pleas.

1. In the Court of Common Pleas, Hudson's Amended Petition for Declaratory Judgment and the evidence thereunder clearly raised all Federal issues.

Subparagraphs (b), (c) and (d) of Hudson's Amended Petition for Declaratory Judgment reproduced at pages 5 through 7 of the Record, both generally and specifically, alleged conflict with the Sherman Antitrust Act, conflict with the Miller-Tydings and McGuire Acts and violation of the Supremacy Clause of Article VI, Clause 2 of the United States Constitution.

In subparagraph (c) of the Amended Petition specific reference was made to the Ohio Code provisions raising the McKesson and horizontal pricing issues. In addition to the foregoing general grounds, such subparagraph also pleaded violation of Federal due process under the Fourteenth Amendment to the Constitution.

The notice question is found in subparagraph (b)(2) of the Amended Petition, likewise containing both general and specific charges of conflict with applicable Federal law.

In addition to the specific Revised Code provisions set forth in subparagraphs (b) and (c), stated by the opening paragraph of paragraph (b) to be in conflict with the Miller-Tydings Act, the McGuire Act and in violation of the Supremacy Clause, paragraph (d) contained the further allegation that the entire Ohio Fair Trade Act was incapable of separation and likewise unconstitutional.

2. Hudson's Brief in support of the allegations contained in its Amended Petition and its Reply Brief contained extended discussion of each of the five questions pressed on the instant appeal.

The Table of Contents of such Briefs reads in part as follows:

"BRIEF IN SUPPORT OF PETITION

* * * * *

* * * * *

REPLY BRIEF.

The McKesson issue was specifically raised at page 7 of Brief in Support of Petition, Hudson noting:

"It is impossible to square this provision of the new Ohio Fair Trade Act with Section 5 of the McGuire Act and *United States v. McKesson & Robbins, Inc.*, 351 U. S. 305 (1956).

It follows from the foregoing that the provisions of the new Ohio Fair Trade Act which permit the doing of what Congress has expressly interdicted, namely, the making of fair trade contracts with wholesalers, is in flat contradiction and violation of federal law."

3. The decision in the Court of Common Pleas plainly indicates that the parties had joined issue on the Federal questions.

The Trial Judge's opinion clearly showed his consideration of the relationship between the federal and state enactments. The court considered such conflict and, as urged by Hudson, found an incongruity between the rights sought to be conferred upon the holder of a trade mark and that possessed by the holder of a patent. Said the Court:

> "The argument is made that since the power to fix prices was available at common law, the Fair Trade Act only (fol. 428) restores this right; and therefore, cannot be a delegation of legislative power. With this argument, the court cannot agree. The act is not to nullify the Valentine Act, but to be an exception to it. *The Fair Trade Act only has existence because Congress made such acts an exception to the Sherman Act. Its existence does not stem from a common law right, but it stems as a specific exemption to the Sherman Act,* and only has life as it fits the exemption. The Fair Trade Act itself rebuts this argument. The legislature specifically granted a proprietary interest in a trade-mark or name, and gave this right to anyone holding this interest to set minimum prices. This right did not exist at common law to the holder or assignee or designee of a trade-mark or name. He may have the right to set prices generally at common law, but not because of his proprietary interest in his trade-mark. For common law rights of trade-marks generally, see: *U. S. v. Timken,* 83 F. Supp. 284 (at p. 315). ***This right granted to a holder of a trade-mark is greater than that possessed by the holder of a patent.*** ***U. S. v. Masonite,*** 62 S. Ct. R. 1070; 316 U. S. 265. This is a specific legislative enactment that gives a holder of a trade-mark or name a right he did not possess previously. This was clearly denoted in the *Union Carbide* case, *supra.*" (Record, page 375) (Emphasis supplied.)

Judge McNeill's decision also specifically noted that the issues raised in the briefs were considered by the court although not discussed in the Opinion in view of the court's finding of lack of constitutionality on state grounds, the court stating:

> "The court deciding this issue as it has, other questions concerning the act raised in the briefs are not discussed."

4. The Court of Common Pleas also decided the Severability Issue Adversely to Lilly.

The Journal Entry recorded in the Court of Common Pleas not only recited the finding of unconstitutionality but also stated that the provisions of the Ohio Fair Trade Act were "integral and inseparable," necessitating the vitiation of the entire legislative enactment.

Of the five (5) issues presently posed to this Court, then, each was posed to the Court of Common Pleas prior to its judgment on July 28, 1960. As will be hereafter observed, each of such issues was also presented and considered by the Ohio Appellate and Supreme Courts and decided adversely to Hudson.

B. Proceedings in Court of Appeals.

1. Hudson's Brief, as appellee in the Court of Appeals for Cuyahoga County, was a reiteration of the Federal argument that had been presented to the trial court.

The record in the Court of Appeals for Cuyahoga County was that the Federal questions urged before the Court of Common Pleas by Hudson were also urged and considered by that court.

The table of contents of Hudson's Brief in the Court of Appeals reads in part as follows:

2. In opposing Hudson's Petition for Rehearing, Lilly insisted that the Court of Appeals had considered and overruled all Federal Questions.

Following the submission of briefs, oral argument and the decision of the Court of Appeals, Hudson petitioned the court for a rehearing on the grounds that the court did not appear to have sufficiently considered the impact of the Supremacy Clause of the Federal Constitution on

the validity of the Ohio statute, the creation of an implied contract under the facts of this case (that is, that all plaintiff's goods were purchased outside Ohio), and the effect of Section 5(a)(5) of the McGuire Act. (R. 409-410.) Four (4) out of the five (5) issues are reflected in the Petition for Rehearing.

Certified copies of all briefs in the Court of Appeals have been deposited with this Court.

That the court had not considered the federal questions, was flatly contradicted by Lilly, which stated in its "Brief of Defendant-Appellant in Opposition to Petition for Rehearing," filed September 8, 1961:

> "Hudson's Petition for Rehearing, and its Brief in Support, merely reiterate arguments which were made by Hudson in its brief and its oral argument to this Court; the asserted grounds for the Petition for Rehearing were all discussed in the briefs of the parties and were orally argued."

On September 21, 1961, the Court of Appeals for Cuyahoga County denied Hudson's Petition for Rehearing and the Journal Entry subsequently entered by the court on September 27, 1961 (reproduced at pages 38 and 39 of the Record) is cited:

> "It is therefore * * * considered, ordered and adjudged that Sections 1333.27 through 1333.34 of the Ohio Revised Code be and the same hereby are declared to be valid, lawful and enforceable enactments of the Ohio General Assembly and not to be in violation of the Constitution of the State of Ohio or of the Constitution of the United States or of any law of the United States; that final judgment be and the same hereby is now entered in this Court for the Defendant-Appellant on the petition filed in this cause in the Court of Common Pleas of Cuyahoga County by the Plaintiff-Appellee * * *."

C. Appeal to Ohio Supreme Court.

Within the period prescribed by Ohio law, Hudson filed with the Supreme Court of Ohio its Notice of Appeal from the decision rendered by the Cuyahoga County Court of Appeals. Two (2) grounds were specified in this Notice of Appeal: (a) a case involving a constitutional question; (b) on condition that a motion to certify be allowed by the court.

Pursuant to the second ground urged in the Notice of Appeal, Hudson filed with the Ohio Supreme Court a motion for an order requiring the Court of Appeals to certify its record to that court for consideration and decision. Following the liberal appeal procedures in effect in Ohio, the motion merely recited that:

> "The cause and questions involved herein are of public and great general interest, as will be more fully disclosed by the briefs to be filed."

1. The Brief in Support of Motion to Certify Record clearly raised the Federal questions.

Rule 8, Section 3 of the Rules of the Supreme Court of Ohio requires that the assignment of error be contained in the brief in support of such motion, together with "a statement of the questions of law presented." By Rule 8, Section 4, a like requirement is imposed upon appellee's brief.

In response to such rules, in its Brief in Support of Motion to Certify Record, pp. 1-2, Hudson stated for its second Assignment of Error:

> "For its second assignment of error, plaintiff-appellant states that the Court of Appeals for Cuyahoga County erred in finding that Sections 1333.27 through 1333.34, inclusive, of the Ohio Revised Code are valid, lawful and enforceable enactments of the Ohio Gen-

eral Assembly and do not violate either the Constitution of the United States or any law of the United States.

II. Is the Ohio Fair Trade Law, Ohio Revised Code, Sections 1333.27 through 1333.34, inclusive, violative of the Constitution of the United States or of any law of the United States?

The Court of Appeals for Cuyahoga County answered: 'No.'

Plaintiff-appellant contends the answer should be 'Yes.'"

Hudson's statement (p. 2) of the second Question of Law involved on the appeal similarly stated:

> "II. Is the Ohio Fair Trade Law, Ohio Revised Code, Sections 1333.27 through 1333.34, inclusive, violative of the Constitution of the United States or of any law of the United States?
>
> The Court of Appeals for Cuyahoga County answered: 'No.'
>
> Plaintiff-appellant contends the answer should be 'Yes.'"

The argument in the Brief in Support of Motion to Certify Record (p. 18) stated in part:

> "Grave questions also exist as to whether the new Ohio Fair Trade Act violates the Supremacy Clause of the United States Constitution by exceeding the bounds set for fair trade legislation by the McGuire Act, 15 U. S. C., Section 45 and the Miller-Tydings Act, 15 U. S. C., Section 1. The federal enabling legislation requires the entry into *actual contracts* under State Fair Trade Laws, not mere 'contracts by notice.' Moreover, the McGuire Act specifically prohibits a manufacturer from fair trading at the wholesale level when he is in competition with his wholesalers for the custom of a retailer. The new Ohio Fair Trade Law specifically permits such unlawful horizontal price fixing."

2. Lilly joined in Hudson's Motion to Certify on Federal grounds.

In its "Brief of Defendant-Appellee on Motion to Certify Record," filed by Lilly in the Supreme Court of Ohio, Lilly, while opposing the assignments of error urged by Hudson on the merits, nonetheless joined in submitting the issues posed by Hudson to the court for its consideration and judgment.

The Federal issues raised by Hudson's appeal on constitutional grounds and in its Motion to Certify the Record joined in by Lilly thus brought the Federal questions squarely before the Ohio Supreme Court.

3. Hudson's Briefs in the Supreme Court of Ohio clearly raised the Federal questions.

In January of 1962, the Supreme Court allowed the Hudson appeal on both grounds specified in its notice of appeal, that is, as a case involving constitutional questions and on the court's allowance of Hudson's motion tc certify. Hudson thereupon filed its Brief on the Merits with the court.

As the partial excerpt from the table of contents of Hudson's Brief hereafter demonstrates, the full range of federal questions now presented to this Court were likewise presented to the Supreme Court of Ohio:

The table of contents of Hudson's Reply Brief likewise states in part:

The scope of Hudson's briefs, both in the Court of Appeals and in the Supreme Court of Ohio, are of particular import by virtue of the requirements of Ohio appellate practice that issues urged by brief on appeal be heard and decided by the Appellate Court. This requirement is contained in Ohio Revised Code, Section 2505.21, reference to which has been made by Hudson at pages 6-7, *supra*.

D. All Federal Issues were properly raised and resolved in the Courts below.

It is clear that the Federal issues raised in the instant appeal were not only considered but decided by the Supreme Court. The obligation to consider the questions raised by Hudson was imposed upon the Ohio Supreme Court by statute. Moreover, the opinion specifically recites that "none of the constitutional attacks on this new Act have merit." (R. 424.)

Nowhere does the Ohio Supreme Court decision state or imply that the federal issues posed by Hudson were not preserved below or ripe for determination. Likewise, no such statement or inference is contained in the decision of the Court of Appeals, where the same issues were urged.

In the decision of the Ohio Supreme Court rendered on May 8, 1963 there is not one word or one line of the

opinion which could be construed as furnishing support to the position now urged by Lilly. It is clear that the Federal issues raised in the instant appeal were not only considered, but decided by the Supreme Court of Ohio. Indeed, the Federal issues necessarily required decision before consideration could be given to the state constitutional issues posed. Moreover, the opinion specifically recites that "none of the constitutional attacks on this new act have merit."

E. Motion to Dismiss in the Supreme Court of the United States.

The contention of Lilly now urged upon this Court, is further discredited by the Motion to Dismiss Hudson's Appeal filed herein by Lilly. Point 3 of Lilly's reasons in support of this motion reads as follows:

> "The history of fair trade in the United States Congress and in the federal courts shows that the Ohio Fair Trade Act is valid under federal law."

Lilly's argument in this motion is on the merits. No mention whatever is made of any alleged failure of Ohio courts to consider and decide the federal issues presented. Counsel for Lilly preparing such motion was also counsel for Lilly throughout the courts of Ohio.

Ohio counsel's joinder on the merits and the total absence in the motion to dismiss of any procedural considerations now sought to be interjected underscores the course of the litigation throughout the Ohio courts and the formulation and maturing of the issues now presented to this Court.

F. The courts and parties construed both litigations as raising the same constitutional issues.

The *Lilly* case and the companion *Upjohn* case, were construed both by the parties and the Ohio courts as raising the same constitutional considerations.

The introduction of the decisions rendered in the Court of Common Pleas, the Court of Appeals and the Supreme Court of Ohio demonstrate the identity of the issues raised in each case.

The Common Pleas decision begins:

> "These cases, although heard separately by the court, involve the same questions, and will be treated together. The plaintiff is seeking declaratory judgments questioning the constitutionality of the so-called Fair Trade Laws. Defendants, by cross petition, seek to enjoin plaintiff from selling their products at less than the fair trade price. In both cases, the evidence was submitted to the court upon stipulations and upon affidavits and counter-affidavits, it being agreed that such affidavits should be regarded as the testimony of the witnesses as if they were present. No question is raised that the parties are not all properly before the court, and that the court has jurisdiction over the subject matter."

The Court of Appeals decision begins:

> "These appeals come to this Court on questions of law from judgments entered for the plaintiffs, appellees herein, in the Court of Common Pleas of Cuyahoga County. The actions seek a declaratory judgment declaring the Ohio Fair Trade Act invalid and unconstitutional. *Both cases involve similar facts and, with the questions to be determined by this Court the same in each case, the appeals will be considered together. The assignment of error is identical in both cases.*"

The Ohio Supreme Court decision likewise begins:

> "These two causes originated in the Court of Common Pleas of Cuyahoga County, in each of which is sought a declaratory judgment that the Ohio Fair Trade Act, Sections 1333.27 through 1333.34, Revised Code, is invalid and unconstitutional. The facts in both cases are similar and the law applicable is the same. The appeals will be treated together, since the assignments of errors in both cases are exactly the same."

Judge McNeill's decision in the Court of Common Pleas specifically noted that the issues raised in the briefs were considered by the court, though not discussed by the opinion, in view of such court's finding of lack of constitutionality on state grounds. The Court stated:

> "The court deciding this issue as it has, other questions concerning the act raised in the briefs are not discussed."

The Journal Entry entered in the Court of Common Pleas further recited that the provisions of the Ohio Fair Trade Act were "integral and inseparable" necessitating the vitiation of the entire Ohio Fair Trade Act.

argument. The Supreme Court in *Engel v. Vitale*, 370 U. S. 421, carefully distinguished expressions of patriotism from official prayers.

> "There is of course nothing in the decision reached here that is inconsistent with the fact that school children and others are officially encouraged to express love for our country by reciting historical documents such as the Declaration of Independence which contain references to the Deity or by singing officially espoused anthems which includes the Composer's professions of faith in a Supreme Being, or with the fact that there are many manifestations in our public life of belief in God. Such patriotic or ceremonial occasions bear no true resemblance to the unquestioned religious exercise that the State of New York has sponsored in this instance." (370 U. S. at page 435, footnote 21)

Re Summers, 325 U. S. 561, supports the validity of the 1931 Act. There, where a bar applicant had refused to take an oath to support the state constitution, this Court held it was not unconstitutional for the state to deny him admission to the bar. This was true even though the state constitution had a provision requiring service in the militia in time of war. The applicant had refused because of his unwillingness based on personal scruples to serve in the state militia in time of war.

If a state can refuse to allow a person to practice law on this ground, surely a state can demand of a teacher, as a condition of employment, the 1931 oath.

THE INTEREST TO BE PROTECTED IS SUBSTANTIAL.

Perhaps the most crucial part of Employees' First Amendment argument concerns the lack of a societal interest to justify the 1955 Act. The Employees must show that the societal interest is not substantial, as in *West Virginia State Board of Education v. Barnette*, 319 U. S. 624. Employees must somehow get around the two reports of the Joint Fact-Finding Committee on Un-American Activities. This they have attempted to do by claiming that parts of the report are false (App. Br. p. 119), and by claiming that the lapse of six years from the report's filing to the 1955 Act is too long for the findings to support the 1955 Act. (App. Br. p. 120)

The *Second Report Un-American Activities in Washington, 1948*, deals, in the main, with the University of Washington. It would serve no purpose to belabor this point. It is a part of the record. When one considers that the reports comprise several hundred pages, it is surprising that Employees can question only a small percentage of its contents. The bulk of the reports stands undisputed.

There is no blanket requirement that every piece of legislation dealing with subversion be preceded by legislative findings, but it cannot be doubted that valid findings often strengthen the legislation when its constitutionality is called into question. After reciting certain legislative findings on the nature of the communist movement too lengthy to be reported here, this Court in *Communist Party v. S.A.C.B.*, 367 U. S. 1, 94, said:

"It is not for the courts to re-examine the validity of these legislative findings, and reject them. See *Harisiades v. Shaughnessy*, 342 US 580. They are the product of extensive investigation by committees of Congress over more than a decade and a half. Cf. *Nebbia v. New York*, 291 US 502. We certainly cannot dismiss them as unfounded or irrational imaginings. See *Galvan v. Press*, 347 US 522; *American Communications Asso. v. Douds*, 339 US 382. * * * "

Nor will this Court give less weight to findings of a state legislature which come to the Court "encased in the armor wrought by prior legislative deliberation." *Bridges v. Calif.*, 314 U. S. 252, 261.

Conceding, arguendo, that conditions could change to such a degree as to vitiate a legislative finding, the dangers resulting from the communist movement referred to in the Joint Committee's report (House Journal 1949, p. 1095 *et seq.*) have not disappeared. This court has, in effect, recognized this fact by deciding the *Communist Party* case, *supra*, on June 5, 1961, although it was based on legislation dating from 1950 to 1954. Subversive activities legislation was passed in 1947, 1949, 1951, 1953 and 1955. Argument that any of this legislation is invalid because additional legislative findings were not made after 1949 seems strained, to say the least.

The Reports of the Joint Fact-Finding Committee reinforce what this Court should decide in any event: There is an interest of the state in self-preservation which justifies the action of the legislature. After this Court's decision in *Garner*, *Adler*

and *Douds*, all *supra*, it is apparent that Employees do not have a valid argument regarding the lack of societal interest to be protected; their argument, if any they have, must be that the means used to protect this interest are unconstitutional.

Once it is decided that the state has a legitimate interest in not keeping in its employ subversive persons, as they are defined in the Subversive Activities Act, as amended, there can be no question of nexus; for however much one may argue that hardened subversives would not hesitate to sign such an oath thus leaving the man of conscience as the victim, the fact is a legislator would be perfectly justified in believing that the disclaimer oath would have a substantial deterrent effect since the criminal sanction might give the subversive employee or applicant pause. "There is some support for this view," writes Professor Ralph S. Brown, "in the history of New York investigations into the loyalty of public school teachers. Some of the witnesses, who in the early 1940's denied communist affiliation before the Rapp-Coudert committee, ten years later found it advisable to plead the Fifth Amendment in response to similar questions from the Senate Internal Security Subcommittee. One proffered explanation for this change in tactics is the availability of sufficient government witnesses in the current investigation to make a criminal prosecution for false swearing stick." Brown, R. S., *Loyalty and Security*, p. 94.

Regents would not even make reference to the discussion (App. Br. p. 142) of the policy of the

University of Washington regarding speakers on the campus—it being not only outside the record but irrelevant as well—were it not for the fact that it is incorrect; the policy referred to was terminated by resolution on January 24, 1964, by the Board of Regents, a date subsequent to the publication of Appellants' Brief.

PART VI

THE 1955 ACT AND THE 1931 ACT DO NOT VIOLATE THE FOURTEENTH AMENDMENT

The Employees Who Refuse to Sign the Disclaimer Oath Are Probably Entitled to a Hearing.

Employees' argument that the 1955 Act violates procedural due process in that it does not allow a hearing seems to have three bases: The Washington Supreme Court allows no hearing to non-tenured personnel and a sham hearing to tenured personnel; no statute allows such a hearing, and the officials charged with administering the acts will allow no hearing, save the sham hearing resulting from the Washington Supreme Court's decision.

It is true that the statutes, court decisions, and administrative actions are the key factors, but Regents submit that they lead to the opposite conclusion.

The Employees, it will be noted, fall into three different categories: those with academic tenure; those with classified civil service tenure, and those with no tenure at all, save possible contract rights.

The Washington Supreme Court has squarely held that those with academic tenure are entitled to a hearing. This has driven Employees into the extreme position of claiming that the Washington Supreme Court sanctioned a sham hearing (App. Br. p. 172), a position which scarcely deserves argument.

With regard to the other two categories no such categoric answer can be given since the Washington high court has not spoken.

First, what is the rule regarding persons with academic tenure? After *Nostrand v. Little, supra,* was remanded by this Court to the Washington high court for determination of whether the professors would be accorded a hearing, counsel for the professors argued that under law no hearing could be accorded to the professors. The state attorney argued to the contrary. In its decision the court held:

> "We are of the opinion that the provision in the subversive activies act to the effect that refusal to take the oath 'on any grounds' shall be cause for 'immediate termination of employment,' should not be interpreted in the case before us as meaning that a full professor having tenure rights under his contract of employment is deprived of the right to a hearing as provided in the rules and regulations of the university. In other words, if the professors should refuse to sign the affidavit (which they have not yet refused to do), they, in our opinion, will be entitled to the hearing before the tenure committee and to the other procedures relating to termination of employment prescribed in the university's rules and regulations, set forth in the appendix to this opinion." 58 Wn. (2d) at p. 131.

But what of persons without academic tenure? Employees' argue that under *Nostrand v. Little*, *supra*, neither the Civil Service Act nor the Administrative Procedures Act could be used to accord Employees a hearing; but in fact, the question of whether persons without academic tenure could take advantage of either act was not before the court. On page 121, the Washington high court tried to preclude just such claims by stating: "We, of course, limit our consideration of the problem to the facts before us."

The real thrust of *Nostrand v. Little*, *supra*, is the fact that the court there held that a professor with tenure could not be discharged under the 1955 Act alone and without reference to any other statutes. If the court construed the 1955 Act with RCW 28-.77.120 and 28.77.130 there is every likelihood that it would consider other statutes if the last quoted statutes were not applicable this would be the case if a person were without tenure.

The two statutes are the Civil Service Act (chapter 1, Laws of the State of Washington 1961) and the Administrative Procedures Act (chapter 234, Laws of 1959). It should be noted that both acts became law some years after the 1955 amendatory act.

It is well to consider the Civil Service Act first, since it appears to apply to some of the non-academic employees who are among the appellants. (The record does not show that each non-academic em-

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It is well to consider the Civil Service Act first, since it appears to apply to some of the non-academic employees who are among the appellants. (The record does not show that each non-academic em-

ployee would come under the exceptions to civil service coverage listed in section 5.) Section 5 provides in part as follows:

> "At each institution of higher learning the governing body shall within thirty days after December 8, 1960 designate three of its members as a permanent personnel committee, compensated and reimbursed as provided in RCW 41.06.110, to enforce and perform for all its nonacademic personnel, except those in positions specifically exempted by the governing body on analogy to the exemptions of * * *"

The extract from the minutes of a meeting of the Board of Regents on December 16, 1960, shows that the following action was taken:

> "It was noted that the civil service initiative which was approved by the voters on November 8, 1960, became law on December 8, 1960, and has legal application to the University of Washington. Under this law the Board of Regents is required to appoint three of its members as a Personnel Committee to administer the provisions of the law on the campus. This Personnel Committee will serve as the University Civil Service Board.
>
> "Attention was also called to the fact that there are several items in the law which require action by the Board at this meeting, since such action must be taken before January 7, 1961.
>
> "These are:
>
> "That by January 7, 1961, the Board of Regents shall select three of its members to serve as a University Personnel Committee for terms of two, four and six years (appointments thereafter to be for six-year terms) to administer the provisions of the law.
>
> "That by January 7, 1961, the Board of Regents shall designate a full time nonacademic

employee to serve as Director of Personnel to direct and supervise the Personnel Department and to prepare for consideration by the University Personnel Committee proposed rules and regulations required by the law.

"Upon the recommendation of President Odegaard, the Board appointed Mr. Reginald Root to serve as Director of Personnel and named the following members of the Board of Regents to serve as the University Personnel Committee for terms of two, four and six years, respectively:

"Regent Robert J. Willis, Chairman (two years)

"Regent Harold S. Shefelman, Vice-Chairman (four years),

"Herbert S. Little (six years)."

The University Personnel Committee adopted a number of rules on October 27, 1961, including Rule XIV. This rule makes applicable to those under its jurisdiction the provisions of sections 18, 19, 20 and 21 of the Civil Service Act, which provide for a hearing procedure.

But what of those Employees who are covered by neither civil service tenure nor academic tenure? That the Employees are hard pressed to find a reason why a hearing would not be granted is evidenced by the manner in which the Employees have emphasized certain portions of the Regents' statement. (App. Br. p. 172.) A reading of the document simply indicates that the Regents intend to follow the law, it does not indicate that under the law no hearing would be accorded an employee. Likewise on page 173 of their brief, Employees have italicized the

words "on any grounds" found in the 1955 Act. The effect would have been very different if they had italicized the following three words, "*shall be cause* for immediate termination * * *" (Emphasis supplied.) There is, of course, a great difference between a matter being a cause for immediate termination and a matter which must result absolutely in immediate termination.

These Employees are probably entitled to a hearing under the Administrative Procedures Act. It is not a certainty because it has never been passed upon by the Washington Supreme Court. This Court will, of course, assume that a statute will be interpreted by the highest state court in such a way as to avoid raising constitutional problems where such interpretation is possible. *Fox v. Washington*, 236 U. S. 273.

Until this is done it is the intention of the state to allow a hearing on the assumption that it is better to err by allowing too much due process rather than too little. Nor is there anything novel about such an approach. In regard to the third factor, state agencies have, upon the advice of the state attorney general, on numerous occasions accorded a hearing to a party on the basis of the Administrative Procedures Act where no specific hearing is provided by statute. An example of this is *In re Christensen*, No. 34575 Thurston County Superior Court, State of Washington. In this case the director of licenses granted a hearing to an applicant who had been refused a broker's license even though such a hearing was not

specifically provided by the Real Estate Licensing Act (chapter 18.85 RCW).

There are undoubtedly times when a hearing would seem appropriate. For example, if an individual attempted to resign from a subversive organization by communicating with one of the members, it is possible this individual would not be sure whether his resignation was effective, since many of such organizations not having membership cards and lists. If such an individual were to ask for a hearing so that he might explain the steps he had taken to attempt to resign it seems probable that the hearing would be allowed under Washington law and administrative practice.

To prevail on this point, Regents need not show that a hearing is definitely required by the statute. They need only show that such a possibility cannot be ruled out. *United Gas Pipe Line Co. v. Ideal Cement Co.*, 369 U. S. 134, 136. The Employees should not be permitted to profit from the uncertainties arising from this action because of its premature nature.

Since a hearing is probably accorded under Washington law, it is probably not necessary for us to rely upon cases upholding the imposition of a civil disqualification with no right to a hearing, such as *Board of Governors of Federal Reserve System v. Agnew*, 329 U. S. 441, *Gerende v. Board of Supervisor of Elections*, 341 U. S. 56, *United Public Workers v. Mitchell*, 330 U. S. 75, *American Com-*

munications Association v. Douds, 339 U. S. 382, and *Cafeteria Workers v. McElroy*, 367 U. S. 886.

How might this act provide such a hearing? Section 9 provides in part: "In any contested case all parties shall be afforded an opportunity for hearing after reasonable notice. * * *" Section 1 defines a contested case as "* * * a proceeding before an agency in which the legal rights, duties, or privileges of specific parties are required by law or *constitutional right* to be determnied after an agency hearing." (Emphasis supplied.).

Gnecchi v. State of Washington, 58 Wn. (2d) 467, 364 P. (2d) 225, a case decided *en banc* a few months after *Nostrand v. Little, supra*, went beyond what was strictly necessary to reach its holding to indicate that under the Administrative Procedures Act, such an employee would be provided a hearing if the lack of a hearing would deprive him of a constitutional right. The court seemed to be following the lead of this Court. (See *Wong Yang Sung v. McGrath*, 339 U. S. 33.)

One final uncertainty with reference to the disclaimer oath should be mentioned. The record is silent as to the provisions of any employment contract. It is impossible to determine, therefore, whether any of the Employees would acquire any hearing rights in this way.

Whether an Employee Who Refuses to Sign the 1931 Oath Would Be Entitled to a Hearing Is a Matter for Conjecture.

It cannot be denied that a literal reading of the 1931 statute indicates that there is less chance that a person refusing to sign the oath it requires would be afforded a hearing than would be the case with the disclaimer oath; yet if the Washington Supreme Court were to read the 1931 statute *in pari materia* with some other statute, such as the Civil Service Act or the Administrative Procedures Act the result would hardly be more surprising than that court's holding in *Nostrand v. Little*, 58 Wn. (2d) 111, 361 P. (2d) 551, on the hearing issue. This leads again to the question of whether the case is ripe for decision, whether there is an actual controversy. (The Court is referred to Part IV for a discussion of this question.)

The 1955 Act Does Not Violate Constitutional Guarantees as to Vagueness.

In dealing with this question (App. Br. pp. 186-192), Employees' difficulty comes not from stating the general rules but from attempting to apply the general rules to this particular case.

The oath required, and the statutes on which it is based, are not unconstitutionally vague; the terms used therein are susceptible of objective measurement.

Employees have quoted no cases which militate against the validity of this oath. *Cramp v. Florida*,

368 U. S. 278, relied upon by Employees on page 192 of their brief is not applicable, for the oath involved in *Cramp* can hardly be compared with the oath in the present case. The former oath provides in part, "* * * that I have not and will not lend my aid, support, advice, counsel or influence to the Communist Party * * *". The Court, itself, seems to have distinguished this case from *Cramp* when, on page 286 it pointed out that:

> "The provision of the oath here in question, it is to be noted, says nothing of advocacy of violent overthrow of state or Federal Government. It says nothing of membership or affiliation with the Communist Party, past or present. The provision is completely lacking in these or any other terms *susceptible of objective measurement*." (Emphasis supplied.)

This Court denied certiorari in a case involving alleged vagueness of the Ober Act which, as pointed out earlier, is very similar to the 1951 Act. *Shub v. Simpson*, 196 Md. 177, 76 A. (2d) 322, 340 U. S. 861. Also significant, is the fact that this Court affirmed *Gerende v. Bd. of Supervisors*, 341 U. S. 56, a decision based upon the *Shub* interpretation. But even more significant is the fact that this Court has affirmed prison sentences—a far cry from this declaratory judgment procedure—stemming from statutes resembling the Subversive Activities Act. One example is the Smith Act, 54 Stat. 671, 18 U. S. C. 2385 (Supp.), as amended. The statute reads in part:

> "Whoever knowingly or willfully advocates, abets, advises, or teaches the duty, neces-

sity, desirability, or propriety of overthrowing or destroying the government of the United States or the government of any State, Territory, District or Possession thereof, or the government of any political subdivision therein, by force or violence. * * *

"Shall be fined not more than $20,000 or imprisoned not more than twenty years, or both. * * *"

Dennis v. United States, 341 U. S. 494, sustained this statute in the face of an allegation, *inter alia*, that it was unconstitutionally vague. In rejecting the contention, the Court said:

"We agree that the standard as defined is not a neat, mathematical formulary. Like all verbalizations it is subject to criticism on the score of indefiniteness * * *

"* * * We think [the statute] well serves to indicate to those who would advocate constitutionally prohibited conduct that there is a line beyond which they may not go—a line which they, in full knowledge of what they intend and the circumstances in which their activity takes place, will well appreciate and understand."

Regents submit that if a criminal statute can make it unlawful to "advocate * * * abet * * * advise * * * or teach * * * the violent overthrow * * * of the government of the United States or the government of any State * * *" without doing violence to the principle of unconstitutional statutory vagueness, a state is free to require an oath in approximately those terms without doing violence to that principle.

While to set forth other statutes would make this brief unduly prolix, the Court is referred to the statutes involved in *Gitlow v. N. Y.*, 268 U. S. 652, and *Whitney v. Calif.*, 274 U. S. 357. This Court refused to strike down oaths and the statutes upon which they are based, which are much more questionable than those in this case. (*Garner v. Bd. of Public Works*, 341 U. S. 716; *American Communications Association v. Douds*, 339 U. S. 382.)

It is not necessary to set forth the lower court's discussion relating to vagueness. (See, R. 245.) The fact that a unanimous three-judge court found that the meaning was not uncertain or vague—in any event not to the extent that the statute must be held unconstitutional—is itself persuasive that the statutes are not void on their face. The lower court pointed out that a person taking the oath, "* * * is not required to speculate concerning the applicability of every conceivable or rare meaning of the words employed." He need only apply them to his own case. (R. 246.)

Although the subject of subversion is susceptible to overdramatization, it should be pointed out that based upon the history of other nations, a statute would be of little use which included within its ambit only those who participate in the *putsch* itself. It must also include those who provide assistance by supplying weapons and the like. Second, an insurrection is not the work of one man and; as a result a statute, to be of any use, cannot include only those who *alone* carried out the attempted *coup d'etat*.

It would avail Employees little to attack the word "revolution," found in the 1951 statute as being ambiguous by claiming that "revolution" could involve a peaceful and constitutional change; this is so because even if this word were found unconstitutional, only the word would be stricken under the state high court's ruling in *Household Finance Corp. v. State*, 40 Wn. (2d) 451, 244 P. (2d) 260. The companion words "force or violence" would remain.

The cases cited by Employees illustrate the general rule regarding vagueness. Employees have cited no cases—indeed, there are no such cases—to show that the 1955 statute is vague. Thus the parade of "horribles" they cite of, "any gang", *Lanzetta v. N. J.*, 306 U. S. 451, "principally made up of criminal news, police reports or accounts of criminal deeds or pictures or stories of deeds of bloodshed, lust or crime," *Winters v. N. Y.*, 333 U. S. 507, "displays a red flag * * * or device of any color * * * as a sign * * * of opposition to organized government. * * * ", *Stromberg v. California*, 283 U. S. 359, and "lend my aid, support, advice, counsel or influence to the Communist Party," *Cramp v. Florida*, 368 U. S. 278, are distinguishable from the 1955 statute.

Once it is determined that the statutes are not void on their face, *Fox v. Washington*, 236 U. S. 273, is applicable, holding that the Court will assume that a statute will be interpreted by the highest state court in such a way as to avoid raising difficult constitutional problems where any such interpretation is pos-

sible. See also *Shuttlesworth v. Birmingham Bd. of Ed.*, 358 U. S. 101. Our state high court would of course, be guided by Section 19 of the 1951 Act which provides in part that, "Nothing in this act shall be construed * * * to limit or infringe upon freedom of the press or freedom of speech or assembly within the meaning and the manner as guaranteed by the Constitution of the United States * * *"

In order to judge whether either oath is a prior restraint in violation of the First Amendment or void for vagueness under the Fourteenth Amendment it is necessary to match the wording of the oaths against the activities and associations of the Employees. The activities and associations of all of the Employees are not set forth in the record; it is, however, possible to assume that in the series of statements of several of the Employees (R. 188-218) the Employees have set forth those associations and activities, in their opinion, most likely to be considered subversive.

Initially it must be conceded that the Employees' statements to the effect that they do not feel they can sign either oath for reasons of conscience cannot be rebutted. The same is true of their belief that the oaths are illegal under the Federal constitution and their belief that signing the oaths would subject them to perjury. But the question of whether the fear of perjury is well-founded is quite another matter. It is not necessary to discuss the affidavits one by one since the affidavits resemble

each other in that the fear of perjury rests on a few types of associations and activities. These activities are working and exchanging information with scholars of countries having a Communist government, editing or contributing to an international scholarly publication and attending academic conferences held under the auspices of a Communist government. The final activity which some of the Employees felt would subject them to perjury was discussing controversial subjects such as the non-recognition of Communist China. (R. 204.)

The organizations listed are nearly all international academic organizations.

It is clear that once the opinions of the Employees as to the legality of the oath and the wisdom of the oath are pared from their affidavits the remaining activities and associations mentioned could by no stretch of imagination result in a conviction for perjury. (A hearing procedure is available, but Regents submit that there would be no risk of perjury to Employees even if there were no hearing procedure to resolve doubts in the borderline area.)

The fact is that the Employees would be remiss in their duties in most cases if they did not belong to these international academic organizations and if they did not write for international publications, or if they did not exchange information of an academic nature with scholars in the same field wherever such scholars may be found, or if they failed to discuss controversial political subjects, statutes and episodes

in history in which, in the opinion of the teacher, the United States acted wrongly. There is no showing that any of the organizations to which the Employees belong "engages in or advocates, abets, advises or teaches, or a purpose of which is to engage in or advocate, abet, advise, or teach, activities intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of the constitutional form of government. * * *" (RCW 9.81.010(3))

It is true that two individuals claim they cannot sign the oath of allegiance because it would conflict with their foreign citizenship. (R. 200, 215) However, in Part VI of this brief Regents have shown that non-citizens have not been requested to sign the oath of allegiance in its statutory form, that they are not at present required to do so and that there is no indication that they will in the future be required to do so.

The point is made that some of the information gained by a Communist government has possible military application. (R. 57) Admittedly, if the test were, does the exchange of information constitute, aid, support, counsel or advice to the Communists, as was true in *Cramp v. Florida*, 368 U. S. 278, the constitutionality of this statute would be more difficult to defend. This, however, is not the test, since the 1955 Act sets forth much more specific requirements.

Nor can it be said that one who engages in the activities set forth by the Employees "aids in the

commission or advocates, abets, advises or teaches by any means, any person to commit, attempt to commit, or aid in the commission of any act intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration" of our constitutional form of government by "revolution, force, or violence." (RCW 9.81.010(5)) Where the Florida statute speaks of "lending aid, support, advice, counsel or influence," the Washington statute speaks in terms of aiding the commission of specific acts of violence. Thus it is clear that the actual threat of a perjury conviction is very different from the Employees' fear of such conviction.

" 'Perjury requires a higher measure of proof than any other crime known to the law, treason alone excepted.' " (*State v. Wallis*, 50 Wn. (2d) 350, 311 P. (2d) 659 (1957).) After starting its opinion with the above quote the Washington Supreme Court proceeded to point out, quoting an earlier case, that to convict one of perjury:

> " 'There must be the direct testimony of at least one credible witness, and that testimony to be sufficient must be positive and directly contradictory of the defendant's oath; in addition to such testimony, there must be either another such witness or corroborating circumstances established by independent evidence, and of such a character as clearly to turn the scale and overcome the oath of the defendant and the legal presumption of his innocence. Otherwise the defendant must be acquitted.' " (50 Wn. (2d) at p. 353)

This statement of the Washington Supreme Court as to the great quantum of proof necessary to convict one of perjury underscores the lack of a reasonable basis for the Employees' expressed fear.

THE 1931 ACT DOES NOT VIOLATE CONSTITUTIONAL GUARANTEES AS TO VAGUENESS.

Employees assert, as if it were a fact, that "any affiant who subscribes falsely to the statutory oath of undivided allegiance, in addition to loss of employment, subjects himself to possible perjury prosecution, punishable by imprisonment in the state penitentiary for not more than fifteen years (RCW 9.72.010, et seq.)," (App. Br. p. 29) The statute cited is the state's perjury statute.

But is is *not* a crime to violate the oath. The oath provides, "I * * * will support * * * and will * * * promote. * * *" It is thus promissory in form. It is not a disclaimer oath. One promises to do certain things in the future. Can a man go to jail for failing to carry out his promises? No, according to any legal authority Regents have found. The rule is found in 70 C. J. S. 462, Sec. 6, Perjury: "A promissory statement ordinarily cannot constitute perjury or false swearing * * * ordinarily it is held that an official oath cannot be the subject of perjury in so far as such oath involves statements purely promissory." If the legislature had provided a specific penalty for breach of this promissory oath the rule would not apply. The rule is set forth in *State v. McCarthy*, 38 N. W. (2d) 679, 686 (255 Wis. 234):

"The official oath to which the defendant subscribed does not affirm the present existence of a fact, and relates to the future conduct of the affiant. The affiant solemnly promises that *he will* support the constitution of the United States and the constitution of the State of Wisconsin, and that *he will* administer justice without respect to persons, and that *he will* faithfully and impartially discharge the duties of his office. Such an oath is called a promissory oath. * * *

"Violation of an oath of office does not constitute perjury as that offense is defined in the law. * * *

"In 1 Hawkins, P. C. 431, first published in 1716, a standard text on English criminal law, the rule is stated thus:

" 'Also from what has been said it appears that the notion of perjury is confined to such public oaths only as affirm or deny some matter of fact contrary to the knowledge of the party; and therefore, it doth not extend to any promissory oaths whatsoever. * * *' "

The fact that it is no crime for a person to violate this oath is the death of Employees' argument that the 1931 statute violates the due process clause because of vagueness. Employees have not produced one case where this Court struck down a statute due to vagueness involving a sanction or lack of sanction comparable to the present case. On the contrary, the cases dealing with vagueness involve a criminal sanction or sanction such as deportation even more drastic than many, if not most, criminal sanctions. (*Jordan v. De George*, 341 U. S. 223. See the annotation, "Indefiniteness of language as affecting validity of criminal legislation—Supreme Court cases," 98 L. Ed. 374.)

The 1955 Act and the 1931 Act Do Not Involve an Unconstitutional Shifting of the Burden of Proof.

Citing *Speiser v. Randall*, 357 U. S. 513, as authority, Employees claim that the 1955 Act involves a denial of procedural due process in that it shifts the burden of proof to the public employee. (App. Br. pp. 182-186) While the Employees' argument might have merit were the oath demanded of the public in general, it has no merit where, as here, the oath requirement is directed to a specific group, to wit, public employees. A much more substantial societal interest exists where a state inquires into the loyalty and fitness of its public employees than where a state inquires into the loyalty and fitness of veterans, or members of a particular race or religion.

The petitioner in *Speiser* prevailed in this Court because of an unconstitutional allocation of the burden of proof in a tax exemption proceeding. This Court went to great lengths to distinguish certain disclaimer oath cases involving a specified group where the oath requirement is backed up by a substantial state interest. Specifically, this Court on page 527, with reference to *Garner v. Bd. of Pub. Wks.*, 341 U. S. 716, *Gerende v. Board of Supervisors*, 341 U. S. 56, and *American Communications Association v. Douds*, 339 U. S. 382, said, "In these cases, however, there was no attempt directly to control speech but rather to protect, from an evil shown to be grave, some interest clearly within the sphere of gov-

ernmental concern." On page 528 the Court said, "The State argues that veterans as a class occupy a position of special trust and influence in the community, and therefore any veteran who engages in the proscribed advocacy constitutes a special danger to the State. But while a union official or public employee may be deprived of his position and thereby removed from the place of special danger, the State is powerless to erase the service which the veteran has rendered his country; though he be denied a tax exemption, he remains a veteran. The State, consequently, can act against the veteran only as it can act against any other citizen, by imposing penalties to deter unlawful conduct." The *Speiser* case, then, cannot be used as authority to support the claim that the 1955 Act involves a deprivation without procedural due process.

Since violation of the oath required by the 1931 Act is not a crime, the very concept of "shifting the burden of proof" would not seem to apply. A bare promise, the breach of which involves no criminal sanction, would hardly suffice to shift the burden of proof.

THE 1931 ACT INVOLVES NEITHER A DEPRIVATION OF SUBSTANTIVE DUE PROCESS NOR A DENIAL OF EQUAL PROTECTION UNDER THE LAW.

By drawing attention to certain parts of the pre-trial order, Employees, on pages 102 and 103 of their brief, have given the impression that aliens are forced to take the oath required by the 1931 Act.

This is not, in fact, correct. This is not the practice of the University of Washington and has not been the practice.

The pre-trial order must be read as a whole. Thus the statement of the President of the University of Washington (R. 175-179) and another paragraph of the pre-trial order (R. 159) must be read along with the portion where aliens are treated specifically. It reads, "For many years, the past practice at the University of Washington with regard to teaching faculty who are aliens, and *at all times material to this cause,* has been *similar* to that suggested by the memorandum circulated through the department of Mathematics and reproduced below." (Emphasis supplied.) The memorandum referred to points out that, "The last clause of the first sentence which reads, 'and undivided allegiance to the government of the United States' may be replaced by the phrase 'insofar as it is compatible with my citizenship in ....'" (R. 158-159). Who can say what other oath form would be "similar"? Yet, on page 103 of their brief, Employees actually state, "* * * the record is clear that an oath, perhaps a modified 1931 oath, has always been required of all alien-professors. * * *" This Court cannot pass on a "modified" oath, which is "similar" to the one set forth in the above memorandum. One thing is certain. The very word "modified" means that it is *not* the 1931 oath.

Thus, Employees' claim that this oath is arbitrary and hence void under the due process clause,

in that it requires aliens to take an oath of undivided allegiance to the United States, thereby placing them in the inconsistent position of averring undivided allegiance to one government while retaining the citizenship of their native country, falls of its own weight.

It is at least arguable that the legislature intended the words, "every person applying for a license to teach * * *" to cover not "every person" in the broadest sense but every person who should owe allegiance to this country. It is to be noted that legislation was enacted prohibiting aliens from teaching *in the common schools* (chapter 38, Laws of 1919, RCW 28.67.010, *et seq.*) Three decades later, chapter 32, Laws of 1949 (RCW 28-.67.020; part) amended Section 1 of the 1919 act to allow exchange teachers *in the public schools* "irrespective of requirements respecting citizenship and oath of allegiance." Neither statute referred to institutions of higher education. This demonstrates that the Washington Legislature in 1949 assumed that the 1931 act did not apply to institutions of higher education. But, of course, whether the long-standing interpretation of the 1931 act by the administrative agencies—even though it is entitled to great weight—is the correct interpretation, is a question for the state courts.

Employees claim (App. Br. pp. 100-101) that if the 1931 oath does not apply to aliens as well as citizens the latter have been denied equal protection

of the laws. The question in all "equal protection" cases is whether a reasonable basis for an allegedly unconstitutional classification exists. *Phillips Chemical Co. v. Dumas Independent School District*, 361 U. S. 376; *Daniel v. Family Security Life Insurance Co.*, 336 U. S. 220; *N. Y. Rapid Transit Corp. v. City of New York*, 303 U. S. 573. The classification here is not only reasonable but tends to avoid possible unfairness to alien employees without in any way derogating from the constitutional rights of non-alien employees since the oath of allegiance as applied to them creates fewer problems.

PART VII

OTHER CONTENTIONS OF EMPLOYEES

The 1955 Oath Requirement Does Not Constitute a Bill of Attainder.

The omissions made by Employees in interpreting *Cummings v. Missouri*, 71 U. S. (4 Wall.) 277, and *United States v. Lovett*, 328 U. S. 303, demonstrate the invalidity of their argument that Washington's disclaimer oath requirement is a bill of attainder.

Employees admit that the oath in this case is prospective and cite no case in which this court has found a prospective act to be a bill of attainder. The acts struck down in the *Cummings* and *Lovett* cases and in *Ex parte Garland*, 71 U. S. (4 Wall.) 333, all involved punishment for past misdeeds. It is true that the punishment for past misdeeds was often

conditioned on a future act, but in each case the individual punished could not have avoided the sanction. As one writer has pointed out in 28 Rocky Mt. L. Rev. 258:

> "Garland and Cummings could not alter the fact that they had supported the confederacy in the Civil War. Lovett, Dodd, and Watson could never again qualify as governmental employees whether they changed their loyalties or not."

The Employees', on page 103 of their brief have used, completely out of context, a quote from Justice Frankfurter's concurring opinion in *United States v. Lovett, supra*, to support their argument that a bill of attainder need not also be *ex post facto* in order to be objectionable. An additional few lines from that opinion demonstrate that the Employees' quote is not apposite. At page 323 of *U. S. v. Lovett*, Justice Frankfurter wrote:

> "Frequently a bill of attainder was thus doubly objectionable because of its ex post facto features. This is the historic explanation for uniting the two mischiefs in one clause—'No Bill of Attainder or ex post facto Law shall be passed.' No one claims that § 304 is an ex post facto law. If it is in substance a punishment for acts deemed 'subversive' (the statute, of course, makes no such charge) for which no punishment had previously been provided, it would clearly be ex post facto. Therefore, if § 304 is a bill of attainder it is also an ex post facto law. *But if it is not an ex post facto law, the reasons that establish that it is not are persuasive that it cannot be a bill of attainder. No offense is specified and no declaration of guilt is made.*" (Emphasis supplied.)

Whether or not that statement was applicable in the *Lovett* case, we submit that it is certainly applicable in the present case. In other words, the fact that the statutes involved in the present case are prospective is convincing evidence that the act was not an act of punishment but rather a regulatory act to control the future action of those coming under the act. A member of a subversive organization cannot claim that he is penalized merely because the state requires him to resign from a subversive organization as a condition of his employment by the state. The requirement of non-membership is reasonably related to the end sought: trustworthy public employees.

Employees wholly ignore the Washington Supreme Court's interpretation of the 1955 Act and the constitutional prohibition against bills of attainder. In *Nostrand v. Balmer*, 53 Wn. (2d) 460, 335 P. (2d) 10 (1959), the Washington Supreme Court followed *Garner v. Bd. of Public Works*, 341 U. S. 716, where this Court said on p. 720:

> "* * * The provisions operating thus *prospectively* were a reasonable regulation to protect the municipal service by establishing an employment qualification of loyalty to the State and the United States. Cf. *Gerende v. Board of Supervisors of Elections*, 341 U. S. 56, ante. Likewise, as a regulation of political activity of municipal employees, the amendment was reasonably designed to protect the integrity and competency of the service * * * *and a State is not without power to do as much.*" (Emphasis supplied.)

The fact is that the oath requirement in the present case works less of a hardship on the person affected than the ordinance and charter amendment involved in the *Garner* case, *supra;* for here a member of a subversive organization may resign today and take the oath tomorrow. Justices Burton's and Frankfurter's objections to the *Garner* ordinance are not present here.

If the oath was an employment qualification in the *Garner* case, it is an employment qualification here. In the *Douds* case, *supra*, the Court said on page 391 in upholding the "non-Communist" affidavit provision of the Taft-Hartley Act that voluntary affiliations and beliefs justify an inference concerning future conduct when drawn by the legislature on the basis of its investigations. If the oath was valid as regulating future conduct in the *Douds* case, it is so in the present case.

The Employees' brief contains considerable discussion about Bills of Attainder being prospective. However, there is a dearth of argument to show that the affidavit requirement constitutes a Bill of Attainder even assuming, *arguendo*, that one could be prospective. To begin with, Employees have not shown any punishment and punishment is certainly a prerequisite. Employees have shown nothing to negate the belief of the lower court that the oath requirement is a reasonable employment qualification. As Mr. Justice Frankfurter said in his concurring opinion in *United States v. Lovett, supra*, on page 324:

"The fact that harm is inflicted by governmental authority does not make it punishment. Figuratively speaking all discomforting action may be deemed punishment because it deprives of what otherwise would be enjoyed. But there may be reasons other than punitive for such deprivation. A man may be forbidden to practice medicine because he has been convicted of a felony, *Hawker v. New York*, 170 U. S. 189, or because he is no longer qualified, *Dent v. West Virginia*, 129 U. S. 114."

Hence, even assuming, *arguendo*, that a bill of attainder could be prospective, the act in question is not a bill of attainder but is an employment qualification. This being true, it would be gratuitous comment for the Court to comment on the possibility of "prospective bills of attainder." It would involve overruling, in part, several cases.

It is submitted that there is no merit to Employees' contention.

THERE HAS BEEN NO PRE-EMPTION OF THE 1955 ACT.

The holding in *Pennsylvania v. Nelson*, 350 U. S. 497, so heavily relied upon by the Employees, has been reduced to its precise facts by *Uphaus v. Wyman*, 360 U. S. 72, 76-77 and *Sweezy v. New Hampshire*, 354 U. S. 234.

The portion of the state statute involved in the pre-emption argument in the *Sweezy* and *Uphaus* cases, *supra*, is the same as Washington's. The *Uphaus* case in 1959 is the last case to discuss "pre-emption." There the Court stated that the pre-emption contention "was denied *sub silentio*" in *Sweezy*,

and thus, with these comparable statutes under consideration, the pre-emption argument appears foreclosed to Employees here as well. In *Uphaus*, at page 76, the court distinguished facts within the *Nelson* case from the case under consideration and stated:

> "* * * In *Nelson* itself we said that the 'precise holding of the court * * * is that the Smith Act * * * which prohibits the knowing advocacy of the overthrow of the Government of the United States by force and violence, supersedes the enforceability of the Pennsylvania Sedition Act which proscribed the *same conduct.*' (Italics supplied.) 350 US, at 499. The basis of Nelson thus rejects the notion that it stripped the States of the right to protect themselves. All the opinion proscribed was a race between federal and state prosecutors to the courthouse door. * * *"

The court proceeded, then, to enumerate areas which states could certainly legislate against. (For an excellent discussion of the *Nelson* and *Uphaus* cases and loyalty oath requirements in general see Professor Cramton's article in 43 Minn. L. Rev. 1025, 1959.)

The Employees' conclusion to their pre-emption argument as stated on page 203 of their brief that alien professors must take the Washington State Oath of Allegiance is an erroneous statement disproven by the records in this case, as shown in Part VI of this brief.

In answer to Employees second argument on pre-emption (App. Br. p. 198), if the State of Washington or any other state chooses to set up require-

ments for its employees which do not permit it to accept Federal monies for the teacher or student exchange programs it may be a detriment to the state; however it is incorrect to state that a refusal by the state to accept optional Federal monies for teacher or student exchanges so interferes with American foreign policy as to render the legislation upon which the refusal is based unconstitutional.

It is therefore submitted that Employees' argument concerning pre-emption should be denied.

THE 1955 ACT DOES NOT REQUIRE SELF-INCRIMINATION.

Employees' contention, that the 1955 statute is void as requiring plaintiffs to incriminate themselves with respect to their own disloyalty, is strained, without merit and should be rejected.

The state high court interpreted this statute in relation to the Fifth Amendment privilege against self-incrimination in *Nostrand v. Balmer*, 53 Wn. (2d) 460, 477, 335 P. (2d) 10, and found no merit in a similar contention. There the court stated:

> "Respondents are not compelled by section twelve to do anything. But, if they desire to remain in public employment, they must comply with the standards of eligibility established by the legislature, * * *"

The disclaimer oath would be relevant in a prosecution for perjury only as the occasion which Employees used to commit perjury.

Since Employees are not being required to give testimony against themselves, *Nostrand v. Balmer*,

supra, but are merely required, pursuant to the 1955 Act, to disclaim their knowing participation in subversive organizations, the statute does not impinge upon the Fifth Amendment privilege against self-incrimination. *Communist Party v. S.A.C. Board*, 367 U. S. 1; *Konigsberg v. State Bar of California*, 366 U. S. 36; *In re Anastaplo*, 366 U. S. 82; *Lerner v. Casey*, 357 U. S. 468; *Cohen v. Hurley*, 366 U. S. 117; *Beilan v. Board of Education*, 357 U. S. 399; *Gerende v. Election Board*, 341 U. S. 56.

Finally, there is a short but conclusive argument which must be mentioned:

> "It is settled law that the clause of the Fifth Amendment, protecting a person against being compelled to be a witness against himself, is not made effective by the Fourteenth Amendment as a protection against state action. * * *" *Adamson v. California*, 332 U. S. 46, 50; also *Twining v. New Jersey*, 211 U. S. 78, 91-98.

The District Court was Correct in Dismissing Employees' Complaint with Prejudice.

The three-judge court properly refused to adjudicate questions involving the 1931 Act. *Martin v. Creasy*, 360 U. S. 219 (1959); *United Gas Pipeline Company v. Ideal Cement Company*, 369 U. S. 134 (1962); *Cf.* annotation, Remission of issues to state court, 3 L. ed. 2d 1827; (compare a similar order by this court in *Nostrand v. Little*, 362 U. S. 474 (1960) and 368 U. S. 436 (1962)). In any event, the dismissal with prejudice as to the 1931 Act only precludes the Employees from bringing another action

in the federal court until after the state court has authoritatively construed that act.

The lower court upheld the constitutionality of the 1955 Act and the dismissal with prejudice was the proper order with which to terminate the litigation. The Employee's contention is without merit.

THE DISTRICT COURT WAS CORRECT IN DISMISSING THE STUDENTS.

Allowing the students to challenge the constitutionality of the statutes involved here would do violence to a longstanding judicial principle. This Court observed in *United States v. Johnson*, 319 U. S. 302, 305, that it would refuse to decide any dispute which "does not assume the 'honest and actual antagonistic assertion of rights' to be adjudicated—a safeguard essential to the integrity of the judicial process, and one which we have held to be indispensable to adjudication of constitutional questions by this Court."

Accordingly, in *Poe v. Ullman*, 367 U. S. 497, this Court refused to pass upon the constitutionality of a state statute where the moving party was unable to show that he was threatened with its immediate enforcement.

The general principle from these cases is applicable here since the statutes challenged in this case have no direct application to students; have never been enforced against students and were not intended to affect students. The students cannot show even an indirect injury.

CONCLUSION

The legislation is not perfect. It is controversial. Many doubt its wisdom. But it violates no constitutional provision and the route is open to legislative amendment and repeal. The wisdom of the statute is, of course, a matter for the legislature, not the courts. See *Daniel v. Family Security Life Ins. Co.*, 336 U. S. 220, at p. 224. There is no reason for Employees to lose faith in the democratic process, a process which repeals oath requirements as well as creates oath requirements. They should not be permitted to avoid the "rough and tumble" of the legislature through this judicial challenge.

This Court should affirm the lower court with regard to its disposition of the challenge to the 1931 Act. Should this Court find that a justiciable controversy exists with regard to the 1955 Act, this Court should affirm the lower court's decision in that regard as well.

Respectfully submitted,

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